

No. 12953

United States
Court of Appeals

For the Ninth Circuit.

See vol. 26 95

NANCY ANN STORYBOOK DOLLS, INC., a
Corporation,

Appellant,

vs.

DOLLCRAFT COMPANY, a Corporation; LES
TER F. HINZ and ROBERT E. KERR,

Appellees.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

SEP 23 1951

No. 12953

United States
Court of Appeals
For the Ninth Circuit.

NANCY ANN STORYBOOK DOLLS, INC., a
Corporation,

Appellant,

vs.

DOLLCRAFT COMPANY, a Corporation; LES
TER F. HINZ and ROBERT E. KERR,

Appellees.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX	PAGE
Affidavit of Hinz, Lester F. Filed November 9, 1949	27
Affidavit of Hinz, Lester F. Filed November 16, 1949	30
Ex. D—Letter Dated October 24, 1949	34
E—Letter Dated October 29, 1949....	37
F—Letter Dated November 2, 1949....	39
G—Letter Dated November 3, 1949....	41
Affidavit of Hinz, Lester F. Filed November 21, 1949	48
Affidavit of Hinz, Lester F. Filed February 4, 1950	76
Affidavit of Juster, Elise.....	52
Affidavit of Kerr, Robert E.....	54
Affidavit of Mellin, Oscar A.....	26
Affidavit of Rowland, A. L. in Support of Defendant's Motion for Leave to Join Additional Parties Plaintiff, and for Issuance of Summons Directing Them to Appear in the Action	44
Answer to Counterclaim.....	79

Appeal:

Bond for Costs on.....	135
Certificate of Clerk to Record on.....	449
Concise Statement of Defendant-Appel- lant's Points on.....	452
Notice of	134
Stipulation Re Record on.....	138
Bond for Costs on Appeal.....	135
Certificate of Clerk to Record on Appeal.....	449
Complaint	3
Concise Statement of Defendant-Appellant's Points on Appeal.....	452
Defendant's Answer and Counterclaim.....	56
Designation of Record.....	140
Findings of Fact and Conclusions of Law.....	105
Judgment	124
Memorandum Opinion.....	94
Minute Order Dated November 10, 1949.....	30
Minute Order Dated November 22, 1949.....	55
Minute Order Dated February 6, 1950.....	78
Motions by Defendant-Counter Claimant for New Trial, or Rehearing, to Amend Findings, to Amend Judgment.....	129
Motion for Preliminary Injunction.....	16

Motion to Vacate Order or in the Alternative to Dismiss Counterclaim.....	74
Names and Addresses of Attorneys.....	1
Notice of Appeal	134
Notice of Motion and Motion for Leave to Join Additional Parties Plaintiff, and for Issuance of Summons Directing Them to Appear in the Action	42
Notice of Motion, and Motion for an Order Vacating Temporary Restraining Order....	19
Affidavit of Orr, Hugh N.....	22
Order Extending Time.....	139
Order Filed January 26, 1951.....	133
Order for Issuance of Summons.....	73
Reporter's Transcript	141
Witnesses, Defendant's:	
Abbott, Nancy Ann	
—direct	404
—cross	410
—redirect	411
Giordano, Albert	
—direct	337
—cross	339
Hinz, Lester F.	
—direct	427
—cross	438
—redirect	441

Witnesses, Defendant's—(Continued) :

Kerr, Robert E.

—direct	416
—cross	423
—redirect	423, 426
—recross	424

McIver, Mrs. Jack

—direct	343
—cross	344

Rowland, Allan L.

—direct	345
—cross	359, 400
—redirect	402

Witnesses, Plaintiff's:

Juster, Maurice

—direct	162, 196
—cross	207, 445
—redirect	242, 415
—recross	243, 245, 412, 416

Rowland, Allan L.

—direct	254, 297
---------------	----------

Stipulation Re Record on Appeal..... 138

Temporary Restraining Order..... 17

Verification 25

NAMES AND ADDRESSES OF ATTORNEYS

HUGH N. ORR, ESQ.,
68 Post Street,
San Francisco, Calif.

WILLIAM G. McKAY, ESQ.,
111 Sutter Street,
San Francisco, Calif.

Attorneys for Appellant.

MELLIN, HANSCOM & HURSH,
OSCAR A. MELLIN, ESQ.,
LEROY HANSCOM, ESQ.,
JACK E. HURSH, ESQ.,
391 Sutter Street,
San Francisco, Calif.

Attorneys for Appellees.

In the United States District Court, Northern
District of California, Southern Division

Civil Action No. 29270G

For Declaratory Relief and to Enjoin
Unfair Competition

DOLLCRAFT CO., a Corporation,
Plaintiff,

vs.

NANCY ANN STORYBOOK DOLLS, INC., a
Corporation,
Defendant.

COMPLAINT

Comes Now the Dollcraft Co., a corporation, plaintiff above-named, and for cause of action against defendant, Nancy Ann Storybook Dolls, Inc., a Corporation, alleges:

I.

That plaintiff, Dollcraft Co., is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has its principal place of business at Santa Clara, State of California.

II.

That plaintiff is informed and believes and on information and belief alleges that the defendant, Nancy Ann Storybook Dolls, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has a

place of business in the City and County of San Francisco, State of California.

III.

That this Court has jurisdiction because—

(a) this complaint is founded upon the trademark laws of the United States concerning the validity and the question of infringement of trademarks registered under the laws of the United States;

(b) jurisdiction is also conferred by Title 28 U.S.C., Section 2201;

(c) the value of the matter in controversy, exclusive of interest, exceeds the amount of Three Thousand Dollars (\$3,000.00).

IV.

That plaintiff, Dollcraft Co., for many years last past has been and now is engaged in the business of designing, manufacturing and selling children's dolls of various types and designs, including a group of dolls which plaintiff designates its "Fairyl-land Series" designed and decorated to depict and visually correspond with and represent various well-known characters referred to in fairy tales, Mother Goose and other nursery rimes; for example:

"Red Riding Hood"

"Little Miss Muffett"

"Little Bo-Peep"

"Mistress Mary"

"Little Miss Donnett"

"Curly Locks"

"Goldilocks"

"Sugar and Spice"

V.

That the container for each of such dolls is inscribed with the well-known name of the character which represents and depicts, and also on such container is prominently displayed the trade-mark and name of this plaintiff.

VI.

That plaintiff has built up an extensive and lucrative business in such dolls so named, and has established an enviable and valuable good will therein, which business and good will is in excess of One Hundred Thousand Dollars (\$100,000.00).

VII.

That defendant has contended and now contends that it has the exclusive right and monopoly of designating dolls depicting and representing fairy tale, Mother Goose and other nursery rime characters by the well-known names given such characters in such fairy tale, Mother Goose and other nursery rimes, and further contends that the names of such characters as given in such fairy tale, Mother Goose and other nursery rimes are the exclusive property and exclusive trade-marks of this defendant; the well-known names of such fairy tale, Mother Goose and other nursery rime characters so claimed to be the exclusive property and trade-marks of defendant, among others, are as follows:

“Red Riding Hood”

“Little Miss Muffett”

- “Little Bo-Peep”
- “Mistress Mary”
- “Little Miss Donnett”
- “Curly Locks”
- “Goldilocks”
- “Sugar and Spice”

VIII.

That defendant has contended and now does contend that it is the owner of the following United States trade-mark registrations on said well-known names of said fairy tale, Mother Goose and other nursery rime characters:

- “Red Riding Hood”Registration No. 429,007
March 26, 1946
- “Little Miss Muffett”Registration No. 432,208
August 26, 1947
- “Little Bo-Peep”Registration No. 395,454
May 26, 1942
- “Mistress Mary”Registration No. 404,576
Dec. 7, 1943
- “Little Miss Donnett”Registration No. 404,586
Dec. 7, 1943
- “Curly Locks”Registration No. 404,581
Dec. 7, 1943
- “Goldilocks”Registration No. 395,451
May 26, 1942
- “Sugar and Spice”Registration No. 403,240
Sept. 14, 1943
- “Storybook”Registration No. 389,114
July 22, 1941

and by reason thereof is entitled to the exclusive use of said names.

IX.

That plaintiff generally designates its group of dolls representing characters in fairy tale, Mother Goose and other nursery rimes as its "Fairyland Series," and defendant has contended and now does contend that the use of such designation for said group of dolls is an infringement of its alleged trade-mark "Fairyland," United States Registration No. 438,495, April 27, 1948.

X.

That plaintiff also designates one of its dolls, which is designed to depict a June bride, by the descriptive term "June Bride," and that the said defendant has contended and now does contend that the use of such name and designation of plaintiff's dolls is an infringement of its alleged trade-mark "June Girl," United States Registration No. 403,261, of September 14, 1943.

XI.

That defendant, with the calculated intent and purpose of destroying the good will and business of plaintiff in its aforesaid dolls, has heretofore, in writing, notified valuable customers of plaintiff to forthwith desist from naming, designating or advertising plaintiff's such dolls by the said well-known fairy tale, Mother Goose and nursery rime names

of the characters which such dolls depict and represent, as aforesaid, which names are as follows:

“Red Riding Hood”

“Little Miss Muffett”

“Little Bo-Peep”

“Mistress Mary”

“Little Miss Donnett”

“Curly Locks”

“Goldilocks”

“Sugar and Spice”

and has threatened said customers with litigation in the event that they refused to forthwith and immediately desist from so doing.

XII.

That defendant, well knowing that it had no exclusive right to use the said names of the said characters in fairy tales, story books, Mother Goose and other nursery rimes, and with the intent to deceive and defraud the customers of plaintiff and to defraud the plaintiff and to destroy plaintiff's said business, did threaten such customers with litigation because of the use by such customers of the names of characters in fairy tales, story books, Mother Goose and other nursery rimes in connection with dolls representing and depicting such characters.

XIII.

That plaintiff is informed and believes and on information and belief alleges that such notification and threatening, as aforesaid, by defendant of the said plaintiff's valuable customers is part of a cal-

culated plan on the part of the defendant to unlawfully destroy the plaintiff's said business in said dolls, and thereby unlawfully eliminate legal and proper competition by this plaintiff.

XIV.

That plaintiff is informed and believes and on information and belief alleges that unless restrained by this Court, defendant will continue to so improperly and unfairly compete with plaintiff by threatening customers of this plaintiff with litigation if they continue to sell the doll products of this plaintiff, all to the irreparable injury and damage of this plaintiff.

XV.

That the said acts of the defendant in so harassing plaintiff by threatening the customers of this plaintiff with litigation because of their advertising and sale of plaintiff's said doll products, as aforesaid, constitute acts of unfair competition in trade, and such acts have diminished the good will and business of this plaintiff, and plaintiff has been damaged by such acts of unfair competition by defendant in an amount which plaintiff cannot at this time accurately determine, but is informed and believes and on information and belief alleges is in an amount in excess of Ten Thousand Dollars (\$10,000.00).

XVI.

That plaintiff is informed and believes and on information and belief alleges that each and every of the said trade-mark registrations claimed to be

owned by this defendant and heretofore set out herein are invalid and were fraudulently and unlawfully obtained, in that the alleged words or phrases so registered are not trade-marks and are incapable of being exclusively appropriated.

XVII.

That plaintiff is informed and believes and on information and belief alleges that unless such trade-mark registrations as heretofore set forth are declared to be invalid by this Court, the defendant will continue to hold itself out to the trade as being entitled to the exclusive use of the words and phrases claimed to be trade-marks in such registrations, and will continue to threaten the trade with litigation should the trade use the names of characters in well-known fairy tale, Mother Goose and nursery rime names to identify dolls depicting and representing such characters, all to the injury and damage of this plaintiff.

XVIII.

That when the names of the various characters in fairy tales, story books, Mother Goose and other nursery rimes are used in connection with dolls depicting and representing such characters, such names are not used in a trade-mark sense but merely in a descriptive and primary sense.

XIX.

That the names of the various characters in fairy tales, story books, Mother Goose and other nursery rimes, when used to designate and identify such

characters, are publici juris and incapable of being exclusively appropriated by defendant as its trade-marks for dolls depicting and representing such characters.

XX.

That the names of the various characters in fairy tales, story books, Mother Goose and other nursery rimes, when applied to dolls depicting and representing such characters, are clearly descriptive and are not capable of being lawfully exclusively appropriated as trade-marks or trade names.

XXI.

That plaintiff does not use the fairy tale, Mother Goose and other nursery rime names of characters which its dolls depict and represent as trade-marks or trade names, but uses said names in their primary sense to describe such dolls.

XXII.

That plaintiff places the following inscription upon packages containing its said dolls:

Dolls with a Story
by Dollcraft
Santa Clara, California

and that defendant also contends that such inscription violates its alleged trade-mark rights in its alleged trade-mark "Storybook."

XXIII.

That plaintiff has not infringed upon any trade-mark rights of defendant.

XXIV.

That, therefore, there is an actual and substantial controversy between plaintiff, Dollcraft Co., and defendant, Nancy Ann Storybook Dolls, Inc., as to the validity of the aforesaid trade-mark registrations and the right to use the names of such fairy tale, Mother Goose, and nursery rime characters therein, and as to the infringement by plaintiff of said trade-mark registrations, and as to the validity and legality of such registrations.

XXV.

That plaintiff has no other adequate and complete remedy than by this complaint for declaratory judgment to determine the respective rights of plaintiff and defendant with respect to the use of the names of the characters of fairy tale, Mother Goose and other nursery rimes, and thereby to determine the respective rights of plaintiff and defendant so that such determination will be *res judicata* and final between the plaintiff and defendant.

Wherefore the Plaintiff Prays:

1. For a preliminary injunction pending the final determination of this suit or action, enjoining the defendant, its associates, partners, attorneys, clerks, servants, agents, employees and confederates, and all in privity with them, and each of them,

(a) from notifying any of plaintiff's customers, dealers or any present or prospective sellers, dealers or users of plaintiff's aforesaid dolls that the sale, offering for sale or adver-

tisement of plaintiff's said dolls violates any rights of this defendant;

(b) from notifying any of plaintiff's customers, dealers or any present or prospective sellers, dealers or users of plaintiff's aforesaid dolls that the defendant has the exclusive right to designate dolls by any of the aforesaid names;

(c) from notifying any of plaintiff's customers, dealers or any present or prospective sellers, dealers or users of plaintiff's aforesaid dolls that they will be sued for trade-mark infringement in the event that they sell, offer for sale or advertise any of plaintiff's aforesaid dolls;

(d) from commencing in this or in any other Court against any of the customers or dealers or any prospective customer or dealer of plaintiff any suit for alleged trade-mark infringement or unfair competition because of the selling offering for sale, or advertising any of plaintiff's dolls herein set forth.

2. For a permanent injunction of the same purport and tenor as the preliminary injunction herein prayed for.

3. That the Court adjudge and declare that the plaintiff has not infringed any trade-mark rights of the defendant.

4. That the Court adjudge and declare that the plaintiff has not unfairly competed with the defendant.

5. That the Court adjudge and declare that the defendant has committed acts of unfair competition against the plaintiff.

6. That the Court declare the following trademark registrations to be invalid and of no legal force and effect:

- “Red Riding Hood” . . . Registration No. 420,007
March 26, 1946
- “Little Miss Muffett” . . Registration No. 432,208
August 26, 1947
- “Little Bo-Peep” Registration No. 395,454
May 26, 1942
- “Mistress Mary” Registration No. 404,576
Dec. 7, 1943
- “Little Miss Donnett” . Registration No. 404,586
Dec. 7, 1943
- “Curly Locks” Registration No. 404,581
Dec. 7, 1943
- “Goldilocks” Registration No. 395,451
May 26, 1942
- “Sugar and Spice” . . . Registration No. 403,240
Sept. 14, 1943
- “Storybook” Registration No. 389,114
July 22, 1941

7. That the Court adjudge and declare that the defendant has no exclusive right to designate dolls representing the following characters in fairy tale, Mother Goose and other nursery rimes by the well-known names given them in such fairy tale, Mother Goose and other nursery rimes:

“Red Riding Hood”

“Little Miss Muffett”

“Little Bo-Peep”

“Mistress Mary”

“Little Miss Donnett”

“Curly Locks”

“Goldilocks”

“Sugar and Spice”

8. That plaintiff be awarded the sum of Twenty-five Thousand Dollars (\$25,000.00) as exemplary damages for the malicious, wanton and unfair interference with the business of plaintiff.

9. For an accounting of the actual damages sustained by this plaintiff because of the acts of unfair competition committed by this defendant.

10. That plaintiff have its costs and disbursements herein.

11. That plaintiff have such other, further or different relief as the Court may deem appropriate in the premises.

DOLLCRAFT CO.,

A Corporation,

By /s/ OSCAR A. MELLIN,

Of Mellin and Hanscom.

MELLIN AND HANSCOM,

OSCAR A. MELLIN,

LEROY HANSCOM,

JACK E. HURSH,

Attorneys for Plaintiff.

[Endorsed]: Filed November 4, 1949.

[Title of District Court and Cause.]

MOTION FOR PRELIMINARY INJUNCTION

Comes Now plaintiff above named, through its attorneys, and moves this Honorable Court for an injunction pendente lite against the defendant above named, enjoining the defendant, its associates, partners, attorneys, clerks, servants, agents, employees and confederates, and all in privity with them, and each of them,

(a) from notifying any of plaintiff's customers, dealers or any present or prospective sellers, dealers or users of plaintiff's dolls set forth in the complaint on file herein that the sale, offering for sale or advertisement of plaintiff's said dolls violates any rights of this defendant;

(b) from notifying any of plaintiff's customers, dealers or any present or prospective sellers, dealers or users of plaintiff's dolls set forth in the complaint on file herein that the defendant has the exclusive right to designate dolls by any of the names set forth in the complaint on file herein;

(c) from notifying any of plaintiff's customers, dealers or any present or prospective sellers, dealers or users of plaintiff's dolls set forth in the complaint on file herein that they will be sued for trademark infringement in the event that they sell, offer for sale or advertise any of plaintiff's dolls set forth in the complaint on file herein;

(d) from commencing in this or in any other Court against any of the customers or dealers or any prospective customer or dealer of plaintiff any suit

for alleged trade-mark infringement or unfair competition because of the selling, offering for sale, or advertising any of plaintiff's dolls set forth in the complaint on file herein.

November 4, 1949.

MELLIN AND HANSCOM,

By /s/ OSCAR A. MELLIN,

Attorneys for Plaintiff.

[Endorsed]: Filed November 4, 1949.

[Title of District Court and Cause.]

TEMPORARY RESTRAINING ORDER

For Good Cause Shown and for a period until the determination of plaintiff's motion for preliminary injunction on file herein, the defendant above named, its associates, partners, attorneys, clerks, servants, agents, employees and confederates, and all in privity with them, and each of them, are enjoined—

(a) from notifying any of plaintiff's customers, dealers or any present or prospective sellers, dealers or users of plaintiff's dolls set forth in the complaint on file herein that the sale, offering for sale or advertisement of plaintiff's said dolls violates any rights of this defendant;

(b) from notifying any of plaintiff's customers, dealers or any present or prospective sellers, dealers or users of plaintiff's dolls set forth in the complaint on file herein that the defendant has the exclusive

right to designate dolls by any of the names set forth in the complaint on file herein;

(c) from notifying any of plaintiff's customers, dealers or any present or prospective sellers, dealers or users of plaintiff's dolls set forth in the complaint on file herein that they will be sued for trade-mark infringement in the event that they sell, offer for sale or advertise any of plaintiff's dolls set forth in the complaint on file herein;

(d) from commencing in this or in any other Court against any of the customers or dealers or any prospective customer or dealer of plaintiff any suit for alleged trade-mark infringement or unfair competition because of the selling, offering for sale, or advertising any of plaintiff's dolls set forth in the complaint on file herein.

It Is Further Ordered that said motion for preliminary injunction on file herein be heard before this Honorable Court on the 22nd day of November, 1949.

It Is Further Ordered that the summons in this case be served upon the defendant not later than Monday, November 7, 1949.

It Is Further Ordered that a copy of said Motion for Preliminary Injunction and a copy of this restraining order be served upon the defendant simultaneously with the serving of the summons issued in this action.

November 4th, 1949.

/s/ MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed November 4, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION, AND MOTION FOR AN
ORDER VACATING TEMPORARY RE-
STRAINING ORDER

To Dollcraft Co., plaintiff above named, and to
Messrs. Mellin and Hanscom, its attorneys:

You and each of you will please take notice that
on Thursday, November 10, 1949, at the hour of
10:00 o'clock a.m., or as soon thereafter as counsel
can be heard, in the courtroom ordinarily occupied
by the Honorable U. S. District Judge Michael J.
Roche, in the United States Court House and Post
Office Building, 7th and Mission Streets, San Fran-
cisco, Calif., defendant above named, by its attor-
neys, will move the above-entitled court for an
Order vacating its previous "Temporary Restraining
Order" dated November 4, 1949.

Said motion will be made upon the grounds that
the order was granted improvidently for each and
all of the following reasons:

(a) The request for said "Temporary Restraining
Order" is not supported by a verified bill of com-
plaint or by affidavit, as required by Rule 65b of the
Federal Rules of Civil Procedure.

(b) No showing of immediate and/or irrepara-
ble, and/or any injury, loss or damage, has been
made by plaintiff in support of said temporary re-
straining order, or its motion for preliminary in-
junction, on the determination of which said tem-
porary restraining order depends.

(c) The acts restrained by said temporary restraining order are included among the rights inherent in the ownership of the trade-marks and the registrations of trade-marks here involved, all of which have been regularly granted to defendant and its predecessors by the United States Patent Office. The effect of the restraining order made by this court is to restrain defendant from the normal acts and practices necessary to protect the property rights heretofore acquired by defendant, and confirmed by registration by the U. S. Patent Office and by the issuance of proper certificates of registration.

(d) Jurisdiction of this court to entertain plaintiff's complaint rests solely upon the theory that the action arises under the trade-mark laws of the United States concerning registrations heretofore granted to defendant under said laws. Diversity of citizenship such as to support a claim for unfair competition alone is not alleged or present. Assuming, but not admitting, that plaintiff is entitled to seek the declaratory judgment of this court upon the issues of validity and infringement of defendant's trade-mark registrations, said registrations are entitled to all the usual presumptions of use, ownership and validity. Unless and until this court, deciding the issues on their merits, determines that defendants trade-mark registrations are invalid or not infringed, any order of this court restraining the exercise of defendant's normal rights and duties (including the duty to notify infringers of their infringement), is outside the jurisdiction of this

court, and/or is an arbitrary and unreasonable exercise of its discretion.

(e) The serving of notice of infringement in case of an unauthorized and infringing use of a party's registered trade-mark is a proper act necessary to the effective preservation of the trade-mark rights, and to the recovery of damages resulting from infringement. The present temporary restraining order restrains such notice, in derogation of the rights inherently attaching to the registrations, and in aid of what appears to be a deliberate and willful invasion of and attack upon defendant's trade-mark rights.

(f) The temporary restraining order is unreasonable in that it restrains notice to "prospective sellers, dealers and users of plaintiff's dolls," which obviously includes everyone who may directly or indirectly buy, sell, or use one of plaintiff's dolls, all in derogation of the exclusive rights presumptively established by the registration of defendant's trade-marks by the U. S. Patent Office.

(g) No appropriate bond, as security for the costs and damages which may be incurred by defendant, has been provided.

(h) The "Temporary Restraining Order" heretofore served is defective and improper in that it does not set forth any adequate reason for its issuance.

In support of the foregoing motion, defendant will

rely upon the papers heretofore served upon it in this action, the annexed affidavit, and upon,

Rules of Civil Procedure, Rule 65a, b, c and d.

/s/ HUGH N. ORR,

/s/ CHARLES V. EVANS,

Attorneys for Defendant.

[Title of District Court and Cause.]

AFFIDAVIT OF HUGH N. ORR IN SUPPORT
OF MOTION TO VACATE TEMPORARY
RESTRAINING ORDER

City & County of San Francisco,
State of California—ss.

Hugh N. Orr, being first duly sworn, deposes and says:

I am one of the attorneys for defendant above named, and for more than ten years last past have actively participated in the registration and enforcement of the trade-mark rights of said defendant and its predecessors.

Defendant and its predecessors have heretofore adopted, used and registered the following trade-marks applied to dressed dolls manufactured and sold by them;

“Red Riding Hood” . . . Registration No. 420,007
March 26, 1946

“Little Miss Muffett” . . . Registration No. 432,208
August 26, 1947

- “Little Bo-Peep”Registration No. 395,454
May 26, 1942
- “Mistress Mary”Registration No. 404,576
Dec. 7, 1943
- “Little Miss Donnett” .Registration No. 404,586
Dec. 7, 1943
- “Curly Locks”Registration No. 404,581
Dec. 7, 1943
- “Goldilocks”Registration No. 395,451
May 26, 1942
- “Sugar and Spice”Registration No. 403,240
Sept. 14, 1943
- “Storybook”Registration No. 389,114
July 22, 1941
- “Fairyland Dolls”Registration No. 438,495
April 27, 1948

Defendant and its predecessors have expended substantial sums in the development and advertising of its and their business of manufacturing and selling dressed dolls under various trade-marks, including those above listed; and have built up a highly valuable good will in connection therewith. Defendant is the present owner of said trade-marks, registrations and good will.

It has been the policy of defendant and its predecessors to seek registration in the United States Patent Office for trade-marks adopted and used by them and which were deemed to be registerable under the trade-mark laws of the United States. It has also been the policy of defendant and its predecessors to protect and enforce their trade-mark

rights in the Patent Office and in the courts. Pursuant to said policies, defendant and its predecessors, on advice of its attorneys have served notice of infringement upon infringers of their trade-mark rights; and from time to time, have taken such other action as they were advised was necessary and proper to protect and enforce said trade-mark rights. Such notices, including those referred to in plaintiff's complaint, have been served in good faith; and upon the advise of counsel.

In Witness Whereof I have hereunto set my signature this 7th day of November, 1949.

/s/ HUGH N. ORR.

Subscribed and sworn to before me this 7th day of November, 1949.

[Seal] /s/ EUGENE P. JONES,
Notary Public.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 8, 1949.

[Title of District Court and Cause.]

VERIFICATION

State of California,
City and County of San Francisco—ss.

Lester F. Hinz, being by me first duly sworn,
deposes and says:

That he is the president of the plaintiff in the
above-entitled action; that he has read the complaint
on file herein and knows the contents thereof; and
that the same is true of his own knowledge, except
as to the matters which are therein stated upon his
information or belief, and as to those matters that he
believes it to be true.

/s/ LESTER F. HINZ.

Subscribed and sworn to before me, a notary public,
this 9th day of November, 1949.

[Seal] /s/ HELEN KITTERBOUGH,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires January 3, 1953.

[Endorsed]: Filed November 9, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF OSCAR A. MELLIN

State of California,

City and County of San Francisco—ss.

Oscar A. Mellin, being first duly sworn, deposes and says:

That he is of legal age; that he is one of the attorneys for the plaintiff herein; that he personally filed the complaint in this action; that he personally presented to the Judge of the District Court a copy of the complaint, the Motion for Preliminary Injunction, and the Temporary Restraining Order, and the affidavit of Lester F. Hinz, and at that time made the showing of the complaint and the affidavit, upon which showing the District Court issued the Temporary Restraining Order; that from the chambers of the said District Judge affiant went immediately to the clerk's office to file said various papers, and thence gave the necessary papers to an associate for presentation to the Marshal with instructions to have the Marshal serve the said papers; that affiant had intended that the said affidavit be filed with the other papers but that through some inadvertence the same was not filed and not given to the Marshal for serving, and that fact was not discovered until Wednesday, November 9, 1949, at which time affiant returned to the office and noted from the defendant's motion that such affidavit was contended not to be filed, and upon checking in his brief-case the affiant found that the original of said affidavit had not been

filed; that the failure to file said affidavit was through inadvertence, accident and mistake.

Further affiant sayeth not.

/s/ OSCAR A. MELLIN.

Subscribed and sworn to before me, a notary public, this 9th day of November, 1949.

[Seal] /s/ HELEN KITTERBOUGH,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires January 3, 1953.

[Endorsed]: Filed November 9, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF LESTER F. HINZ

(November 4, 1949)

State of California,

City and County of San Francisco—ss.

Lester F. Hinz, being first duly sworn, deposes and says:

That he is the president of Dollcraft Co., a corporation of California; that the said Dollcraft Co. has been, since approximately August, 1948, engaged in the business of manufacturing and selling children's dolls including a group of dolls which said Dollcraft Co. designates its "Fairyland Series," which dolls are descriptively named to correspond

[Title of District Court and Cause.]

AFFIDAVIT OF OSCAR A. MELLIN

State of California,

City and County of San Francisco—ss.

Oscar A. Mellin, being first duly sworn, deposes and says:

That he is of legal age; that he is one of the attorneys for the plaintiff herein; that he personally filed the complaint in this action; that he personally presented to the Judge of the District Court a copy of the complaint, the Motion for Preliminary Injunction, and the Temporary Restraining Order, and the affidavit of Lester L. Hinz, and at that time made the showing of the complaint and the affidavit upon which showing the District Court issued the Temporary Restraining Order; that from the chambers of the said District Judge affiant went immediately to the clerk's office to file said various papers and thence gave the necessary papers to an associate for presentation to the Marshal with instructions to have the Marshal serve the said papers; that affiant had intended that the said affidavit be filed with other papers, but through some inadvertence the said affidavit was not given to the Marshal for filing and was not discovered.

filed; that the failure to file said affidavit was through inadvertence, accident and mistake.

Further affiant sayeth not.

/s/ OSCAR L. ELLIS.

Subscribed and sworn to before me, a Notary Public, this 5th day of November, 1940.

[Seal] /s/ HELEN KILPATRICK

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires Jan 7 1902.

[Endorse]: Filed January 14, 1966

File of District Court and Case

AFFIDAVIT OF LOAN & P. 871X

James H. Thompson, Secretary of the American Society for the Prevention of Cruelty to Animals, is shown in a photograph. He is a man with a mustache, wearing a suit and tie, and is looking towards the camera. The photograph is a black and white portrait.

stur-

Descriptive

...half years

inc., at no time

of its customers,

with the characters which they represent; for example:

“Red Riding Hood”

“Little Miss Muffett”

“Little Bo-Peep”

“Mistress Mary”

“Little Miss Donnett”

“Curly Locks”

“Goldilocks”

“Sugar and Spice”

and that Dollcraft Co. has applied such descriptive names to such dolls corresponding with the characters which said dolls represent and depict; that lately and for the first time the Nancy Ann Storybook Dolls, Inc. has charged that the use of such descriptive names and terms by Dollcraft Co. violates trade-mark rights of Nancy Ann Storybook Dolls, Inc.; that charges of unfair competition and infringement by the use of such descriptive terms and names have been made by letter to various of the customers of Dollcraft Co., including Macy's of San Francisco; that certain of the customers of Dollcraft Co., but not including Macy's of San Francisco, have contacted affiant upon receipt of such notification and threats of litigation from the attorneys of Nancy Ann Storybook Dolls, Inc., and have requested affiant to have Dollcraft Co. accept return of said goods of Dollcraft Co.; that at the present time Dollcraft Co. is in the midst of selling customers for the Christmas trade, and to have its customers so notified will, in affiant's opinion, not only destroy part

of the custom of Dollcraft Co., but might result in permanent loss of such customers, and if such loss of customers occurs at the present time, Dollcraft Co. will be considerably financially injured.

Affiant further says that he is familiar with the financial status of Dollcraft Co.; that it has a factory and plant in the County of Santa Clara, and that he is certain that said Dollcraft Co. is completely able financially to respond to any judgment of this Court as to damages and costs in the event this Court should award damages and costs to the Nancy Ann Storybook Dolls, Inc. because of alleged infringement of its trade-marks by Dollcraft Co. and its customers; that any suits brought against its customers, because of the sale of Dollcraft Co.'s products and because of the use by said customers of Dollcraft Co.'s designation of its dolls, would, in the opinion of affiant, have the effect of completely strangling and stifling Dollcraft Co.'s trade and likely irreparably and permanently destroying its business.

/s/ LESTER F. HINZ.

Subscribed and sworn to before me, a notary public, this 4th day of November, 1949.

[Seal] /s/ HELEN KITTERBOUGH,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires January 3, 1953.

[Endorsed]: Filed November 9, 1949.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 10th day of November, in the year of our Lord one thousand nine hundred and forty-nine.

Present: the Honorable Lloyd L. Black,
District Judge.

[Title of Cause.]

MINUTE ORDER

This case came on regularly this day for hearing on the motion to vacate restraining order. After hearing Messrs. Mellin and Orr, it is Ordered that said motion be denied.

[Title of District Court and Cause.]

AFFIDAVIT OF LESTER F. HINZ

(November 15, 1949)

State of California,
County of Santa Clara—ss.

Lester F. Hinz, being first duly sworn, deposes and says:

That he is President of Dollcraft Co., a corporation of California; that said Dollcraft Co. has been engaged, since approximately May, 1948, in the business of manufacturing and selling dressed dolls;

that included in the dolls so manufactured by Dollcraft Co. is a group of dolls which said Dollcraft Co. designates its "Fairyland Series"; that an example of said group is a doll bearing the descriptive name, "Red Riding Hood"; that said "Red Riding Hood" doll is filed herewith and marked "Exhibit A"; that Nancy Ann Storybook Dolls, Inc., defendant herein, also manufactures a doll bearing the descriptive name, "Red Riding Hood"; that a sample of said Nancy Ann Storybook Dolls, Inc., is filed herewith marked "Exhibit B"; that the Dollcraft Co. doll, "Exhibit A," sells at retail from \$1.69 to \$1.95; while the Nancy Ann Storybook Dolls, Inc., doll, "Exhibit B," sell at retail for \$1.29; that Dollcraft Co. also sells dolls under the descriptive names of:

"Red Riding Hood"

"Little Miss Muffett"

"Little Bo-Peep"

"Mistress Mary"

"Little Miss Donnett"

"Curly Locks"

"Goldilocks"

"Sugar and Spice"

Affiant further states that although Dollcraft Co. has been engaged in the business of manufacturing and selling said dolls under said descriptive names for approximately one and one-half years that Nancy Ann Storybook Dolls, Inc., at no time notified said Dollcraft Co., or any of its customers,

respecting trade-mark infringement or unfair competition until October 25, 1949; that on October 23, 1949, Macy's of San Francisco, a customer of Dollcraft Co., advertised in the San Francisco Chronicle the sale of Dollcraft Co. dolls under the descriptive names: "Red Riding Hood," "Little Bo-Peep" and "Sugar and Spice"; that in said ad Macy's described the dolls as "story dolls" and "your favorite story-book dolls"; that a copy of said advertisement is attached hereto and marked "Exhibit C"; that thereafter in a letter dated October 24, 1949, Macy's was notified of unfair competition and infringement by Nancy Ann Storybook Dolls, Inc., because of the use, by Macy's, of said descriptive names in said advertisement and in the sale of said dolls, a copy of said letter of October 24, 1949, is attached hereto marked "Exhibit D"; that said letter to Macy's was the first notice received either by Dollcraft Co., or by any of said Dollcraft Co. customers of unfair competition and trade-mark infringement; that thereafter and by letter dated October 29, 1949, Dollcraft Co. received a letter charging unfair competition and infringement by Nancy Ann Storybook Dolls, Inc., because of its use of the said descriptive names in designating its dolls; a copy of said letter of October 29, 1949, is attached hereto marked "Exhibit E"; that thereafter other customers of Dollcraft Co. have been notified of unfair competition and infringement by Nancy Ann Storybook Dolls, Inc., and in many instances on receipt of said notification said customers have requested Dollcraft Co. to accept the

return of said goods sold to them by Dollcraft Co.; that Whitney's Playland At Beach on receipt of such a notice returned dolls it purchased; that West Coast 5-10-25 Cent Stores, a customer of Dollcraft Co., received a notice of infringement, dated November 2, 1949, a copy of said letter of November 2, 1949, is attached hereto marked "Exhibit F"; that said customer immediately contacted Dollcraft Co. by letter dated November 3, 1949, desiring to return said goods, a copy of said letter of November 3, 1949, is attached hereto marked "Exhibit G"; that said notification, "Exhibit G," is typical of the type of notification being received by Dollcraft Co. from its customers.

Affiant further says that typical of the sales by Dollcraft Co. of said dressed dolls are the sales for the month of October, 1949, where said Dollcraft Co. sold goods in the amount of approximately Fifteen Thousand (\$15,000.00) Dollars; that Dollcraft Co. has sold, and is now selling, dolls throughout the entire United States and at the present time is in the midst of its Christmas trade; that Dollcraft Co. employs in the manufacture and sale of its dolls, fifteen employees; that Dollcraft Co. has invested in said business of manufacturing dolls approximately Fifty Thousand (\$50,000.00) Dollars; that Dollcraft Co. is fully capable of responding to any judgment of this Court as to damages and cost in the event this Court should award damages and cost to Nancy Ann Storybook Dolls, Inc.

/s/ LESTER F. HINZ.

Subscribed and sworn to before me this 15th day of November, 1949.

[Seal] /s/ DOUGLAS M. NEILSON,
Notary Public in and for the County of Santa
Clara, State of California.

My commission expires May 14, 1953.

EXHIBIT D

(Copy)

Letterhead of the Firm of
Charles S. Evans
Attorneys and Counselors at Law
Crocker Building
San Francisco

October 24, 1949.

Macy's,
Stockton at O'Farrell,
San Francisco 8, California.

Dear Sirs:

This is in regard to your advertisement of dolls, appearing in the October 23, 1949, issues of the San Francisco Chronicle.

In behalf of our client, Nancy Ann Storybook Dolls, Inc. (with whose organization and products your purchasing and advertizing departments are undoubtedly familiar), you are hereby notified that your advertisement involves unfair competition, and infringement of our client's rights.

In particular, your reference to the products you advertized as "story" dolls and "story-book dolls,"

is believed to be obviously calculated to cause confusion, and to trade on the good will which has resulted from our client's long and nationwide use of its trade-mark "Storybook," (Reg. U. S. Pat. Office, No. 389,114, dated July 22, 1941).

In addition, you list among the products offered for sale, both in the body of the advertisement and the order blank included therein, dolls identified by the trade-marks owned by our client and registered in the U. S. Patent Office as follows:

"Red Riding Hood."

(Registration No. 420,007, dated March 26, 1946.)

"Little Bo-Peep."

(Registration No. 395,454, dated May 26, 1942.)

"Sugar and Spice."

(Registration No. 403,240, dated Sept. 14, 1943.)

Your sale of dolls bearing any of these registered trade-marks obviously involves a direct infringement of our client's rights.

It is hereby demanded that you discontinue forthwith your unfair and infringing practice above noted; and that you take appropriate steps to correct the confusion resulting from your advertisement. In that regard, our client demands that you promptly publish a statement correcting the implication that the dolls referred to in your advertisement are products of Nancy Ann Storybook Dolls, Inc. Such statements should be displayed at least

as prominently as your advertisement displays "story" and "storybook dolls," and the "Red Riding Hood," "Little Bo-Peep" and "Sugar and Spice" trade-marks. It is suggested that the statement be in substance as follows:

"The dolls featured in our advertisement appearing in the San Francisco Chronicle dated October 23, 1949, and referred to as "story dolls" and "story-book dolls" are not products made and sold by Nancy Ann Storybook Dolls, Inc., under its registered trade-mark "Storybook," or any of its registered trade-marks "Red Riding Hood," "Little Bo-Peep" and "Sugar and Spice."

A different wording for the notice may be worked out with your attorneys, if you prefer.

This matter requires your immediate attention.

Very truly yours,

THE FIRM OF CHARLES S.
EVANS,

By /s/ HUGH N. ORR.

JL

EXHIBIT E

Letterhead of the Firm of
Charles S. Evans
Attorneys and Counselors at Law
Registered Patent Attorneys
Crocker Building
San Francisco

October 29, 1949.

Registered Mail
Dollcraft Co.
Santa Clara, California.

Dear Sirs:

It has come to the attention of our client, Nancy Ann Storybook Dolls, Inc., that you have been making and selling dressed dolls in connection with which you have been using various names and trade-marks in a manner involving unfair competition and infringement of our client's trade-mark rights.

In particular, it is noted that your products have been variously referred to in advertising and on your labels as "Story" dolls, "Story-book" dolls, "Dolls with a Story," and similar designations, all calculated to cause confusion and to trade upon the good will attaching to our client's trade-marks "Storybook" (Registration No. 389,114, dated July 22, 1941) and "Story" (application for registration pending).

Also, it is noted that you are making, advertising and selling dolls in direct violation of our client's rights in the following trade-marks and registrations:

"Fairyland"	Registration 438,495 April 27, 1948
"Red Riding Hood"	Registration 420,007 March 26, 1946
"Little Miss Muffett"	Registration 432,208 Aug. 26, 1947
"Little Bo Peep"	Registration 395,454 May 26, 1942
"Mistress Mary"	Registration 404,576 Dec. 7, 1943
"Little Miss Donnett"	Registration 404,586 Dec. 7, 1943
"Curley Locks"	Registration 404,581 Dec. 7, 1943
"Goldilocks"	Registration 395,451 May 26, 1942
"Sugar and Spice"	Registration 403,240 Sept. 14, 1943
"June" ("June Girl")	Registration 403,261 Sept. 14, 1943

Demand is hereby made that you forthwith discontinue your unfair and infringing use of each and all of the marks above referred to, and all marks confusingly similar thereto; and that you account to our client for all loss and damage suffered by it, and all profits derived by you by reason of your unfair and infringing practices above noted.

Our client regards this matter as one of importance; and your immediate recognition of our client's trade-mark rights is imperative. Our client has instructed us to take whatever action may ap-

pear proper to enforce its rights, and protect its interests. We will wait a reasonable time for your reply, say ten days from the date of this notice, before taking further action.

Very truly yours,

THE FIRM OF CHARLES S.
EVANS,

By /s/ HUGH N. ORR.

EXHIBIT F

Letterhead of the Firm of
Charles S. Evans
Attorneys and Counselors at Law
Registered Patent Attorneys
Crocker Building
San Francisco

November 2, 1949.

West Coast 5c & 25c Store,
1252 Polk Street,
San Francisco, California.

Dear Sirs:

It has come to the attention of our client, Nancy Ann Storybook Dolls, Inc., that you have been selling dressed dolls in connection with which you have been using various names and trade-marks in a manner involving unfair competition and infringement of our client's trade-mark rights.

In particular, it is noted that the products you have been selling have been variously referred to in advertising and on the labels as "Story" dolls,

“Story-book” dolls, “Dolls with a Story,” and similar designations, all calculated to cause confusion and to trade upon the good will attaching to our client’s trade-marks “Storybook” (Registration No. 389,114, dated July 22, 1941, and “Story” (application for registration pending).

Also, it is noted that you are advertising and selling dolls marked in direct infringement of our client’s rights in the following trade-marks and registrations: “Fairyland,” (Reg. 438,495); “Red Riding Hood,” (Reg. 420,007); “Little Miss Muffett,” (Reg. 432,208); “Little Bo-Peep,” (Reg. 395,454); “Mistress Mary,” (Reg. 404,576); “Little Miss Donnett,” (Reg. 404,586); “Curley Locks,” (Reg. 404,581); “Goldilocks,” (Reg. 395,451); “Sugar and Spice,” (Reg. 403,240) and “June,” (Reg. “June Girl” 403,261).

Demand is hereby made that you forthwith discontinue your unfair and infringing use of each and all of the marks above referred to, and all marks confusingly similar thereto; and that you account to our client for all loss and damage suffered by it, and all profits derived by you by reason of your unfair and infringing practices above noted.

Our client regards this matter as one of importance; and your immediate recognition of our client’s trade-mark rights is imperative.

Very truly yours,

THE FIRM OF CHARLES S.
EVANS,

By /s/ HUGH N. ORR.

EXHIBIT G

Letterhead of
West Coast 5-10-25 Cent Stores
Buying and Executive Office
1252 Polk Street
San Francisco 9, California

November 3, 1949

The Dollcraft Company,
P. O. Box 267,
Santa Clara, California.

Gentlemen:

Please find enclosed a letter which we received today by registered mail which is self-explanatory.

Please advise immediately as to what we should do with this merchandise that we have on hand.

Very truly yours,

/s/ JOHN R. VERZI,

JOHN R. VERZI,

West Coast 5-10-25c Store, 1252 Polk Street, San
Francisco, Calif.

[Endorsed]: Filed November 16, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION FOR
LEAVE TO JOIN ADDITIONAL PARTIES
PLAINTIFF, AND FOR ISSUANCE OF
SUMMONS DIRECTING THEM TO AP-
PEAR IN THE ACTION

To Dollcraft Co., plaintiff above named, and to
Messrs. Mellin and Hanscom, its attorneys:

You and each of you will please take notice that
on Monday, November 21, 1949, at the hour of 10:00
o'clock a.m., or as soon thereafter as counsel can be
heard, in the United States Court House and Post
Office Building, 7th and Mission Streets, San Fran-
cisco, California, defendant above named, by its at-
torneys, will move the above-entitled court as fol-
lows:

1. For an order joining as parties plaintiff in
this action Lester E. Hinz, of Los Gatos, California,
and Robert E. Kerr, of San Carlos, California;

2. For an order directing that Summons be
issued directing said Lester E. Hinz and Robert E.
Kerr to appear in the action; and

3. For an order extending defendants time to an-
swer or otherwise plead in this action to a date ten
days subsequent to the order of this court granting
or denying the foregoing motion.

In support of said motions, defendant will rely
upon all the papers heretofore filed in the record of
this case, upon the annexed affidavit, and upon

Federal Rules of Civil Procedure,
Rule 19.

Federal Rules of Civil Procedure,
Rule 13.

Carter Oil Co. vs. Wood,
30 F. Supp. 875.

Arizona Lead Mines Co. vs. Sullivan Mining
Co.,
3 F.D.R. 135.

General Motors Corp. vs. Provus,
100 F. 2nd 562.

Dangler vs. Imperial Mach. Co.,
11 F. 2nd 945.

National Nut Co. vs. Kelling Nut Co., et al.,
61 F. Supp. 76; 65 U.S.P.Q. 104

Wisconsin, etc. Foundation vs. Vitamin Tech.,
Inc.

41 F. Supp. 857; 51 U.S.P.Q. 345.

Denominational Env. Co. vs. Duplex Env. Co.,
80 F. 2nd 186, (Sec. 1.194)

Dated: San Francisco, Calif., November 16, 1949.

NANCY ANN STORYBOOK
DOLLS, INC.,

By /s/ HUGH N. ORR,

By /s/ CHARLES S. EVANS.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 18, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF A. L. ROWLAND IN SUPPORT OF DEFENDANT'S MOTION FOR LEAVE TO JOIN ADDITIONAL PARTIES PLAINTIFF, AND FOR ISSUANCE OF SUMMONS DIRECTING THEM TO APPEAR IN THE ACTION

State of California,
City & County of San Francisco—ss.

A. L. Rowland, being first duly sworn, deposes and says:

I am Secretary-Treasurer of Nancy Ann Storybook Dolls, Inc., and have actively participated in the management of said company and its predecessors since the initial founding of the organization more than twelve years ago. I am familiar with substantially all of the activities of defendant company and its predecessors.

Defendant Nancy Ann Storybook Dolls, Inc., is the present owner of the following trade-marks and U. S. Patent Office registrations thereof:

- “Red Riding Hood” . . . Registration No. 420,007
March 26, 1946
- “Little Miss Muffett” . . Registration No. 432,208
August 26, 1947
- “Little Bo-Peep” Registration No. 395,454
May 26, 1942
- “Mistress Mary” Registration No. 404,576
Dec. 7, 1943

“Little Miss Donnett”	Registration No. 404,586
	Dec. 7, 1943
“Curly Locks”	Registration No. 404,581
	Dec. 7, 1943
“Goldilocks”	Registration No. 395,451
	May 26, 1942
“Sugar and Spice”	Registration No. 403,240
	Sept. 14, 1943
“Storybook”	Registration No. 389,114
	July 22, 1941
“Fairyland Dolls”	Registration No. 438,495
	April 27, 1948

All of said marks have been used by defendant and its predecessors as trade-marks for dressed dolls continuously for many years. It has been the policy of defendant and its predecessors to protect its and their trade-mark rights against infringing and/or unfair use by others, including the formal serving of notice and the filing of suit when deemed necessary. All notices of infringement have been served by counsel or with the approval of counsel.

Affiant is informed and believes, that Lester E. Hinz is president of plaintiff Dollcraft Co. Said Lester E. Hinz, then operating as Myers Ceramic Co., made and supplied to defendant's predecessors bisque doll bodies used by them for making their dressed doll products during the period January, 1943, to July, 1945. Affiant is informed and believes that neither said Lester E. Hinz nor his company, Myers Ceramic Company, had previously manufactured doll bodies; and that the manufacture of said

doll bodies was undertaken by said Hinz and his company primarily and substantially exclusively for defendant's predecessors during the period indicated.

Robert E. Kerr was employed by defendant's predecessors during the period January, 1941, to June 28, 1944. As an employee of defendant's predecessors, said Kerr had opportunity to and, as affiant is informed and believes, did acquire confidential information with regard to the methods of manufacture, used by defendant's predecessors, the source of various materials used by said predecessors in the manufacture of its doll products, and other matters of importance in relation to the conduct of the business.

Affiant is informed and believes that the individuals, Lester E. Hinz and Robert E. Kerr, and perhaps others now unknown to affiant, have conspired to utilize information and knowledge acquired by them by reason of their previous connections with defendant company, to organize and operate a business of manufacturing and selling dressed dolls of the general kind made and sold by defendant's predecessors; and, as affiant now believes the organizing and the operation of said business was under the direct personal supervision and control of said Lester E. Hinz and Robert E. Kerr, and was primarily for their individual benefits; and in so organizing and operating said business, said individuals made unfair use of the facilities and knowledge gained from said confidential relationships with defendant's predecessors, to the substantial and con-

tinuing damage and injury of defendant and its predecessors.

Affiant is further informed and believes that plaintiff Dollcraft Co. is controlled and dominated by said Lester E. Hinz and Robert E. Kerr and that said corporation constitutes merely a mask for the personal activities, interests and liabilities of the said individual officers and stockholders.

Affiant further is informed and believes that in the conduct of said business said Lester E. Hinz and Robert E. Kerr, individually and as officers and stockholders of plaintiff company have deliberately copied defendant's doll products, including non-essential details thereof; and deliberately and for the purpose of trading upon the good will of defendant and its predecessors, has applied to said products marks identical with or confusingly similar to each of the trade-marks and registrations above listed in wilful infringement of defendant's trademark rights.

In Witness Whereof I have hereunto set my signature this 17th day of November, 1949.

/s/ A. L. ROWLAND.

Subscribed and sworn to before me this 17th day of November, 1949.

[Seal] /s/ EUGENE P. JONES,
Notary Public.

Receipt of copy acknowledged.

[Endorsed]: Filed November 18, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF LESTER F. HINZ

(November 18, 1949)

State of California,

City and County of San Francisco—ss.

Lester F. Hinz, being first duly sworn, deposes and says:

That Dollcraft Co. was formed as a copartnership on or about September 28, 1946, the copartners being Elise Juster, Maurice Juster and Richard Molli-son, and the business of Dollcraft Co. at that time was the designing, dressing and the sale of dressed toy dolls, and it has been continuously in business since that time in such business; that some time subsequent to September 28, 1946, Dollcraft Co. became a customer of Kerr & Hinz Doll Company, purchasing from said Kerr & Hinz Doll Company undressed dolls in considerable quantity; that some time just prior to April 20, 1948, the said Dollcraft Co. became considerably indebted to said Kerr & Hinz Doll Company for the purchase of such dolls and had insufficient capital to liquidate such debts; that in order to avoid bankruptcy of Dollcraft Co. and to safeguard the account receivable, said Robert E. Kerr and Lester F. Hinz, as individuals, agreed with the said copartners of Dollcraft Co. to transfer the assets and good will of Dollcraft Co. into a corporation, the said Robert E. Kerr and the said Lester F. Hinz taking stock in liquidation of the debt to the partnership of Kerr & Hinz Doll Com-

pany and for the advance of additional capital to make Dollcraft Co. solvent and enable it to operate on a business basis; the stock in the corporation which was formed on April 20, 1948, was issued fifteen (15) shares to Lester F. Hinz, fifteen (15) shares to Robert E. Kerr, five (5) shares to Maurice Juster, five (5) shares to Elise Juster, and five (5) shares to Richard Mollison; that ever since that time the business of Dollcraft Co. has been under the complete management of Maurice and Elise Juster, who spend all of their time in the active management of the business; that all of the Dollcraft Co.'s products, which are dressed dolls, are designed by the said Elise Juster, and said Elise Juster and Maurice Juster have determined and now do determine all of the designs to be produced by Dollcraft Co., and do all of the purchasing of materials and other things necessary to conduct said business; that the said Robert E. Kerr and the said Lester F. Hinz take no active part in the management of said business except in an advisory capacity to said Maurice Juster; that the selling of the dolls is under the direction and control of Maurice Juster, and that the salesmen for the dolls are hired by Dollcraft Co. and paid by Dollcraft Co.; that the said Robert E. Kerr, as far as the doll business is concerned, spends his entire time in the production and sale of undressed toy dolls of various types and kinds; that said Lester F. Hinz acts only in an advisory capacity in the business of Kerr & Hinz Doll Company and Dollcraft Co.; that said

Lester F. Hinz devotes his entire time to the business of Myers Ceramic Products Co.

That affiant is the owner of the Myers Ceramic Products Co., of Santa Clara, California, and has been the owner and operator of said business since some time in 1936, and that business, continuously from that date, has been the business of manufacturing tile; art objects, bathroom accessories, statuary and the like; that the process and methods of making bisque toy dolls is exactly the same as that of making statuary, art objects and bathroom accessories, requiring only differently shaped molds; that some time during 1941 he was offered the business of making bisque dolls in his said plant for Nancy Ann Storybook Dolls, Inc.; that he provided the molds and accepted orders from Nancy Ann Storybook Dolls, Inc., for dolls, and up until approximately the middle of 1945 produced bisque dolls for Nancy Ann Storybook Dolls, Inc., upon the order of Nancy Ann Storybook Dolls, Inc., and that approximately at that time he was advised by A. L. Rowland that Nancy Ann Storybook Dolls, Inc., had procured a ceramic plant of a nature similar to the plant of the Myers Ceramic Products Co., at Stockton, California, and indicated to affiant that they would no longer purchase the bisque dolls from affiant, and that shortly thereafter orders for dolls from Nancy Ann Storybook Dolls, Inc., to the Myers Ceramic Products Co. completely ceased; that at that time the Myers Ceramic Products Co. had a considerable investment in molds and equipment for making toy dolls and immediately sought other cus-

tomers for its undressed dolls; immediately thereafter affiant developed said business of manufacturing undressed dolls and has sold them nationwide ever since, one of its customers being Dollcraft Co., a copartnership, as previously set out herein; that the business of selling undressed dolls to various customers throughout the nation grew rapidly and to assist him in the business, the said Lester F. Hinz formed a partnership with Robert E. Kerr, the business of which was to promote the sale of undressed dolls manufactured by the Myers Ceramic Products Co.; that said copartnership was known as Kerr & Hinz Doll Company, and the capital for the company was supplied jointly by the said Lester F. Hinz and the said Robert E. Kerr; that the business of that concern was to purchase the bisque dolls from the Myers Ceramic Products Co., decorate them but not dress them, and sell them to various customers throughout the entire United States, including Dollcraft Co., and at the present time said firm of Kerr & Hinz Doll Company have over one hundred (100) customers in various parts of the United States for said dolls; that the said Kerr & Hinz Doll Company has been in said business continuously since the middle of 1945 and now are in that same business, in which business the said Robert E. Kerr devotes all of his time; that affiant and the said Robert E. Kerr do not take any active part in the management of Dollcraft Co. or in the design or procurement of materials for the dolls produced by Dollcraft Co. other than the bisque dolls themselves but merely act in an advisory capacity

to Maurice and Elise Juster; that no suggestions or other information were ever given to affiant by anyone associated with Nancy Ann Storybook Dolls, Inc., in affiant's manufacture of bisque dolls other than the ordinary information as to the sizes and selection ordinarily made by customers, and that no trade secret, confidential or other information in this connection was ever turned over to affiant by Nancy Ann Storybook Dolls, Inc.

/s/ LESTER F. HINZ.

Subscribed and sworn to before me this 18th day of November, 1949.

[Seal] /s/ HELEN KITTERBAUGH,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires January 3, 1953.

[Endorsed]: Filed November 21, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF ELISE JUSTER

State of California,
County of Santa Clara—ss.

Elise Juster, being first duly sworn, deposes and says:

That affiant has been in the business of dressing dolls since September, 1946; that at all times the dress of all dolls made and sold by Dollcraft Co.

were and are the original creations of affiant and express affiant's own picturization of the characters represented, retaining, however, the well known basic characteristics clearly identifying the characters which said dolls depict and represent; that affiant has never received any information of any type or character from Lester F. Hinz or Robert E. Kerr respecting the design of doll dresses, types of material to be used in said dresses, the source of material for said dresses or the methods of producing said dresses; that affiant was in the business of creating dress designs and dressing and selling dolls for approximately a year prior to her personally knowing either Robert E. Kerr or Lester F. Hinz.

/s/ ELISE JUSTER.

Subscribed and sworn to before me this 18th day of November, 1949.

[Seal] /s/ DOUGLAS M. NEILSON,
Notary Public in and for the County of Santa Clara,
State of California.

My commission expires May 14, 1953.

[Endorsed]: Filed November 21, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT E. KERR

State of California,
County of Santa Clara—ss.

Robert E. Kerr, being first duly sworn, deposes and says:

That he was employed by Nancy Ann Storybook Dolls, Inc., between the period of 1941 and 1945, commencing as stock boy clerk and later in charge of shipping; that he had nothing to do with the designing of the dolls or the purchasing of any materials therefor; that he was not in any confidential capacity, was never consulted in connection with policies or other matters of a confidential nature in said concern; that he invested a small amount of capital in the firm of Kerr & Hinz Doll Company in approximately 1945, and ever since that time has been continuously active and has devoted all of his time to the business of that company in the selling of undressed dolls; that he has not and does not now take any active part either in the design or production of dressed dolls by Dollcraft Co. or in the management thereof, other than his normal duties in Kerr & Hinz Doll Company in maintaining the Dollcraft Co. supplied with undressed dolls; that he received and obtained no confidential or other information while an employee of Nancy Ann Storybook Dolls, Inc., and therefore could not have used or employed any such information or divulged any such information to either the firm of Kerr & Hinz Doll

Company, Myers Ceramic Products Co., or Dollcraft Co.

/s/ ROBERT E. KERR.

Subscribed and sworn to before me this 18th day of November, 1949.

[Seal] /s/ DOUGLAS M. NEILSON,
Notary Public in and for the County of Santa Clara,
State of California.

My commission expires May 14, 1953.

[Endorsed]: Filed November 21, 1949.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 22nd day of November, in the year of our Lord one thousand nine hundred and forty-nine.

Present: the Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

MINUTE ORDER

This case came on regularly this day for hearing on motion for a preliminary injunction and motion to join additional parties plaintiff. After hearing Mr. Hursh and Mr. Orr, it is Ordered that the mo-

tion for a preliminary injunction be denied without prejudice. Further Ordered that ruling be reserved on the motion to join parties plaintiff. Further Ordered that defendant have ten days within which to answer the complaint herein.

[Title of District Court and Cause.]

DEFENDANT'S ANSWER AND COUNTERCLAIM

Answering the complaint heretofore filed in the above-entitled action, defendant admits, denies and alleges, as follows:

1. Defendant admits that plaintiff Dollcraft Co. is a corporation of the State of California; and that it has a place of business at Santa Clara, County of Santa Clara, State of California.

2. Defendant admits that it is a corporation duly organized and existing under and by virtue of the laws of the State of California; and that it has a place of business in the City and County of San Francisco, State of California.

3. Defendant admits the jurisdiction of this court because the action involves the validity and infringement of trade-marks registered under the trade-mark laws of the United States; and admits that jurisdiction is also conferred by Title 28, U.S.C. Sec. 2201, and that the matter in controversy, exclusive of interest, exceeds the amount of Three Thousand Dollars (\$3,000.00).

tion for a preliminary injunction be denied without prejudice. Further Ordered that ruling be reserved on the motion to join parties plaintiff. Further Ordered that defendant have ten days within which to answer the complaint herein.

[Title of District Court and Cause.]

DEFENDANT'S ANSWER AND COUNTERCLAIM

Answering the complaint heretofore filed in the above-entitled action, defendant admits, denies and alleges, as follows:

1. Defendant admits that plaintiff Dollcraft Co. is a corporation of the State of California; and that it has a place of business at Santa Clara, County of Santa Clara, State of California.
2. Defendant admits that it is a corporation duly organized and existing under and by virtue of the laws of the State of California; and that it has a place of business in the City and County of San Francisco, State of California.
3. Defendant admits the jurisdiction of this court because the action involves the validity and infringement of trade-marks registered under the trade-mark laws of the United States; and admits that jurisdiction is also conferred by Title 28, U.S.C. Sec. 2201, and that the matter in controversy, exclusive of interest, exceeds the amount of Three Thousand Dollars (\$3,000.00).

4. Defendant admits that plaintiff Dollcraft Co. has heretofore manufactured and sold children's dolls, which said plaintiff has designated its "Fairyl-land Series," and which it has further designated by the marks "Red Riding Hood," "Little Miss Muffett," "Little Bo-Peep," "Mistress Mary," "Little Miss Donnett," "Curly Locks," "Goldilocks" and "Sugar and Spice"; but as to all other allegations of numbered paragraph IV, defendant is without knowledge, information or belief and therefore denies each and all of said other allegations.

5. Defendant admits that plaintiff Dollcraft Co. has sold dolls packaged in containers bearing the names recited in paragraph 4 hereof, but denies that said plaintiff has any right to so mark said dolls and/or the containers therefor; and in all other respects denies each and all of the allegations of numbered paragraph V of plaintiff's complaint.

6. Defendant is without knowledge, information or belief with respect to the allegations of paragraph VI of plaintiff's complaint, and therefore denies each and all of said allegations.

7. Defendant admits that it has contended and now contends that it has the exclusive right to apply to dressed dolls various trade-marks owned by it including the following trade-marks heretofore adopted and used by it and its predecessors and registered in the United States Patent Office:

"Red Riding Hood"...Registration No. 420,007
March 26, 1946

- “Little Miss Muffett” . . . Registration No. 432,208
August 26, 1947
- “Little Bo-Peep” Registration No. 395,454
May 26, 1942
- “Mistress Mary” Registration No. 404,576
Dec. 7, 1943
- “Little Miss Donnett” . Registration No. 404,586
Dec. 7, 1943
- “Curly Locks” Registration No. 404,581
Dec. 7, 1943
- “Goldilocks” Registration No. 395,451
May 26, 1942
- “Sugar and Spice” Registration No. 403,240
Sept. 14, 1943
- “Storybook” Registration No. 389,114
July 22, 1941
- “Fairyland Dolls” Registration No. 438,495
April 27, 1948

but in all other respects defendant denies the allegations of paragraph VII of plaintiff's complaint; and further denies that it has contended or now contends that it has the exclusive right and monopoly of designating dolls by names of characters in fairy tale, Mother Goose and other nursery rhymes, other than as defendant has acquired such exclusive right by adoption, use and registration as trade-marks of certain names of that general classification, including those hereabove listed.

8. Defendant admits the allegations of paragraph VIII of plaintiff's complaint.

9. Defendant admits the allegations of paragraph IX of plaintiff's complaint.

10. Defendant admits the allegations of paragraph X of plaintiff's complaint.

11. Defendant admits that it has heretofore notified, in writing, various retail dealers that their sale of dressed dolls bearing defendant's registered trade-marks, including those listed in paragraph XI of plaintiff's complaint, involves infringement and unfair competition, and has demanded that such unfair and infringing practices be discontinued; but defendant denies that said notices were served with intent or purpose of destroying any good will and/or business of plaintiff to which plaintiff was or is lawfully entitled, and alleges that all such notices were served in good faith solely for the proper protection of the trade-marks, business and good will of defendant.

12. Defendant denies each and every allegation of paragraph XII of plaintiff's complaint.

13. Defendant denies each and every allegation of paragraph XIII of plaintiff's complaint.

14. Defendant denies each and every allegation of paragraph XIV of plaintiff's complaint; except that it admits and alleges that it will continue to serve notice of infringement and unfair competition upon dealers who sell or offer to sell dressed dolls not originating with defendant and which bear a trade-mark identical or confusingly similar to any trade-mark owned by defendant.

15. Defendant denies each and all of the allegations of paragraph XV of plaintiff's complaint.

16. Defendant denies each and all of the allegations of paragraph XVI of plaintiff's complaint; and alleges that each and every trade-mark referred to has been properly and exclusively appropriated and used by defendant and its predecessors, and has been validly registered in the United States Patent Office, and is now owned by defendant.

17. Defendant admits that unless its trade-mark registrations herein involved are declared to be invalid, it will continue to claim the exclusive right to use the same in connection with the sale of its doll products, and to take such action as may be advised to restrain unfair and infringing use of said registered trade-marks by others; but denies that it has heretofore threatened or will hereafter threaten the trade in any way because of the use of fairy tale, Mother Goose and/or nursery rhyme names for dolls other than those heretofore or hereafter appropriated and owned by defendant and its predecessors; and denies that plaintiff has been or will be unjustly damaged by reason of defendant's conduct.

18. Defendant denies each and all of the allegations of paragraph XVIII of plaintiff's complaint; and asserts that the names for which defendant has secured the registrations herein involved have in fact been used as trade-marks, and are validly registered as such.

19. Defendant denies that the names appropriated and used by it and its predecessors for identifying doll products of its and their manufacture are *publici juris*, and/or that they are incapable of being exclusively appropriated as trade-marks by defendant and its predecessors; and defendant alleges that said names have in fact been used as trade-marks and are recognized as such by the public in general.

20. Defendant denies each and all of the allegations of paragraph XX of plaintiff's complaint; and alleges that at least as to names of the general description referred to, which defendant and its predecessors have adopted and used for dressed dolls, the names have been used in a trade-mark sense, and have acquired a trade-mark significance recognized by the purchasing public.

21. Defendant denies each and all of the allegations of paragraph XXI of plaintiff's complaint; and alleges that plaintiff's use of fairy tale, Mother Goose and other nursery rhyme names registered as trade-marks by defendant is calculated to cause confusion and to enable plaintiff to benefit unjustly from the good will which defendant has established.

22. Defendant admits the allegations of paragraph XXII of plaintiff's complaint.

23. Defendant denies the allegations of paragraph XXIII of plaintiff's complaint.

24. Defendant admits the allegations of paragraph XXIV of plaintiff's complaint, except that

it denies that there is any controversy or question with respect to defendant's right to adopt and use the names of fairy tale, Mother Goose and nursery rhyme names, as trade-marks or otherwise.

25. Defendant admits that the right of defendant to adopt, use and register the trade-marks herein involved, and the alleged right of plaintiff to use the same or confusingly similar marks on goods of the same descriptive properties should be determined by this court.

Wherefore defendant prays:

1. That plaintiff's action be dismissed.
2. That defendant recover from plaintiff its costs of suit herein, including attorney's fees.
3. That defendant have such other and further relief as may be found proper.

Counter-Claim

By way of counter-claim and/or cross-complaint, defendant Nancy Ann Storybook Dolls, Inc., alleges:

I. That defendant-counter-claimant is a corporation duly organized and existing under the laws of the State of California and is successor to Nancy Ann Dressed Dolls, (a partnership), and Nancy Ann Dressed Dolls, Inc., (a corporation of the State of California); and has a place of business at San Francisco, California.

II. That plaintiff-counter defendant, Dollcraft

Co., is a corporation of the State of California and, as defendant is informed and believes, is successor to a partnership previously operating under substantially the same name.

III. That, as defendant is informed and believes, Lester E. Hinz is a resident of Los Gatos, County of Santa Clara, State of California; and is president of plaintiff Dollcraft Co.; and has actively participated in the organization of said company, and in the direction of its policies and affairs, from a date prior to its incorporation. It is further alleged, on information and belief, that said Lester E. Hinz owns all or a substantial interest in Myers Ceramic Products Co., and Kerr & Hinz Doll Co., both of which organizations have a place of business at Santa Clara, County of Santa Clara, State of California, and both of which organizations have heretofore been and now are engaged in the business of manufacturing and/or processing dolls ultimately distributed to and through retail dealers as the product of Dollcraft Co.

IV. That Robert E. Kerr is a resident of San Carlos, County of San Mateo, State of California; and is vice-president of plaintiff Dollcraft Co., and has actively participated in the organization of said company and in the direction of its policies and affairs from a date prior to its incorporation. It is further alleged that said Robert E. Kerr owns a substantial interest in Kerr & Hinz Doll Co., which organization has heretofore and now is engaged in the business of manufacturing and/or processing

dolls ultimately distributed to and through retail dealers as the product of plaintiff Dollcraft Co.

V. That this is a claim for infringement of trade-mark rights owned by defendant-counter-claimant, arising under the trade-mark laws of the United States; and also involving questions of unfair competition arising out of acts of the plaintiff-counter-defendants above named in connection with their practices in infringement of defendant's trade-mark rights, with respect to which the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars (\$3,000.00).

VI. That defendant and its predecessors for many years have been and now are engaged in the business of manufacturing and selling dressed dolls sold through department stores and other retail establishments throughout the United States and in foreign commerce.

VII. That the dolls so manufactured and sold have been marked with various trade-marks heretofore adopted and exclusively used by defendant and its predecessors to identify said dolls as the product of defendant and its predecessors, including the following trade-marks heretofore registered in the United States Patent Office:

“Red Riding Hood” . . . Registration No. 420,007
March 26, 1946

“Little Miss Muffett” . . . Registration No. 432,208
August 26, 1947

"Little Bo-Peep"	Registration No. 395,454 May 26, 1942
"Mistress Mary"	Registration No. 404,576 Dec. 7, 1943
"Little Miss Donnett"	Registration No. 404,586 Dec. 7, 1943
"Curly Locks"	Registration No. 404,581 Dec. 7, 1943
"Goldilocks"	Registration No. 395,451 May 26, 1942
"Sugar and Spice"	Registration No. 403,240 Sept. 14, 1943
"Storybook"	Registration No. 389,114 July 22, 1941
"Fairyland Dolls"	Registration No. 438,495 April 27, 1948
"June Girl"	Registration No. 403,261 Sept. 14, 1943

VIII. That said trade-marks and each of them were appropriated by defendant-counter-claimant and its predecessors, and have been used by them continuously from a date long prior to the commission of the acts of plaintiff-counter-defendants herein complained of; and that said trade-marks and each of them have been assigned to and are now owned by defendant-counter-claimant, together with all rights and claims pertinent thereto.

IX. That the dolls manufactured and sold by defendant-counter-claimant and its predecessors, have been of excellent quality and workmanship, and are widely known and recognized as products

dolls ultimately distributed to and through retail dealers as the product of plaintiff Dollcraft Co.

V. That this is a claim for infringement of trade-mark rights owned by defendant-counter-claimant, arising under the trade-mark laws of the United States; and also involving questions of unfair competition arising out of acts of the plaintiff-counter-defendants above named in connection with their practices in infringement of defendant's trade-mark rights, with respect to which the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars (\$3,000.00).

VI. That defendant and its predecessors for many years have been and now are engaged in the business of manufacturing and selling dressed dolls sold through department stores and other retail establishments throughout the United States and in foreign commerce.

VII. That the dolls so manufactured and sold have been marked with various trade-marks heretofore adopted and exclusively used by defendant and its predecessors to identify said dolls as the product of defendant and its predecessors, including the following trade-marks heretofore registered in the United States Patent Office:

“Red Riding Hood” . . . Registration No. 420,007
March 26, 1946

“Little Miss Muffett” . . . Registration No. 432,208
August 26, 1947

"Little Bo-Peep"	Registration No. 395,454 May 26, 1942
"Mistress Mary"	Registration No. 404,576 Dec. 7, 1943
"Little Miss Donnett"	Registration No. 404,586 Dec. 7, 1943
"Curly Locks"	Registration No. 404,581 Dec. 7, 1943
"Goldilocks"	Registration No. 395,451 May 26, 1942
"Sugar and Spice"	Registration No. 403,240 Sept. 14, 1943
"Storybook"	Registration No. 389,114 July 22, 1941
"Fairyland Dolls"	Registration No. 438,495 April 27, 1948
"June Girl"	Registration No. 403,261 Sept. 14, 1943

VIII. That said trade-marks and each of them were appropriated by defendant-counter-claimant and its predecessors, and have been used by them continuously from a date long prior to the commission of the acts of plaintiff-counter-defendants herein complained of; and that said trade-marks and each of them have been assigned to and are now owned by defendant-counter-claimant, together with all rights and claims pertinent thereto.

IX. That the dolls manufactured and sold by defendant-counter-claimant and its predecessors, have been of excellent quality and workmanship, and are widely known and recognized as products

which conform to a high standard of quality; that said trade-marks and each of them have become widely known and identified as indicating products made and sold by defendant-counter-claimant and its predecessors; that defendant and its predecessors have been and now are widely and favorably known, and its various doll products have acquired great popularity and are widely known and sought as toys and by collectors of dolls.

X. That said products so made and sold are commonly known and referred to by the public by the trade-marks variously applied thereto by defendant-counter-claimant and its predecessors; and that by reason of long and extensive use of said trade-marks and the excellent reputation which defendant-counter-claimant and its predecessors and their products have enjoyed, a highly valuable good will has been built up in connection with said trade-marks and each of them, said value being greatly in excess of the jurisdictional amount of Three Thousand Dollars (\$3,000.00).

XI. That for a period of many months last past, the start of which period is unknown to defendant-counter-claimant, but which period is believed to have begun long subsequent to the adoption and use of each of the trade-marks here involved by defendant-counter-claimant and its predecessors, plaintiff-counter-defendants have applied to dolls of their manufacture marks identical with or confusingly similar to the registered trade-marks of defendant-counter-claimant as set forth, including:

"Red Riding Hood"	Registration No. 420,007
	March 26, 1946
"Little Miss Muffett"	Registration No. 432,208
	August 26, 1947
"Little Bo-Peep"	Registration No. 395,454
	May 26, 1942
"Mistress Mary"	Registration No. 404,576
	Dec. 7, 1943
"Little Miss Donnett"	Registration No. 404,586
	Dec. 7, 1943
"Curley Locks"	Registration No. 404,581
	Dec. 7, 1943
"Goldilocks"	Registration No. 395,451
	May 26, 1942
"Sugar and Spice"	Registration No. 403,240
	Sept. 14, 1943
"Storybook"	Registration No. 389,114
	July 22, 1941
"Fairyland Dolls"	Registration No. 438,495
	April 27, 1948
"June Girl"	Registration No. 403,261
	Sept. 14, 1943

XII. That said marks, so applied by plaintiff-counter-defendants were knowingly and wilfully adopted and used by said plaintiff-counter-defendants with the intent to deceive and confuse the public, and the trade in general, for the purpose and with the effect of trading upon the reputation and good will of the business and products of defendant-counter-claimant and its predecessors, and of causing purchasers to buy the doll products

of plaintiff-counter-defendants bearing one or more of defendant-counter-claimant's trade-marks above listed, believing them to be the trade-marked product of defendant-counter-claimant and its predecessors sold under the trade-marks respectively simulated by plaintiff-counter-defendants' marks; and that such use of the said trade-marks by plaintiff-counter-defendants constitutes infringement of defendant-counter-complainant's rights in and to the trade-marks listed in paragraph XI of this counter-claim.

XIII. That plaintiff - counter - defendants have widely advertised dolls each bearing one or more of the marks hereinabove listed, and has included in the packages containing said dolls lists of other doll products bearing one or more other marks of said list.

XIV. That such use and advertising by plaintiff-counter-defendants of defendant-counter-claimant's trade-marks as hereinabove alleged involves unfair competition in that it is calculated to confuse and deceive, and in fact has confused and deceived the public into believing that its and their goods are those of defendant-counter-complainant; and, as defendant-counter-complainant is informed and believes, has enabled plaintiff-counter-defendants to trade upon and unjustly profit from the reputation and good will of defendant-counter-claimant and its predecessors and their products, and to palm off their products upon purchasers (including the general public) who are mislead to believe they are purchasing dolls made by defendant-counter-claimant and its predecessors, particularly with respect

to dolls desired by collectors for addition to collections of the dolls of the various series heretofore produced and widely publicized by defendant-counter-claimant and its predecessors under the trade-marks above set forth.

XV. That plaintiff-counter-defendants have had due notice of the trade-mark rights of defendant-counter-complainant and of plaintiff-counter-defendants' infringement and unfair competition as hereinabove alleged; and each and all have refused to discontinue said acts of infringement and unfair competition, and unless restrained by this court will continue the acts complained of.

XVI. That said Lester E. Hinz, then operating as Myers Ceramic Co., made and supplied to defendant's predecessors bisque doll bodies for use in making dressed dolls during the period January, 1943, to July, 1945; and, as defendant is informed and believes, neither said Hinz or said Myers Ceramic Co. had previously manufactured doll bodies; and that said manufacture of said doll bodies was undertaken by said Hinz and his said company primarily and substantially exclusively for defendant's predecessors during said period. Doll bodies manufactured by said Hinz and his said Myers Ceramic Co. for Kerr & Hinz Doll Co. and plaintiff Dollcraft Co. are, as defendant is informed and believes, substantially the same as those initially made for and supplied to defendant's predecessors, and are made by methods and in accordance with practices developed by or for defendant's predecessors.

Robert E. Kerr, and each of them, their respective associates, agents, servants, employees, heirs, successors and all others in privity with them or any of them, be enjoined during the pendency of this action and permanently thereafter:

(a) from using any of the trade-marks of defendant-counter-claimant herein involved, or any mark confusingly similar thereto, alone or in conjunction with any other mark, symbol or design, upon or in connection with the sale of any doll or other product of the same descriptive properties as the doll products to which defendant - counter - complainant's trade-marks have been applied;

(b) from infringing in any way defendant's trade-mark rights in any of its trade-marks herein involved; and

(c) from doing, inducing, aiding or directing others to do any act involving or which may cause unfair competition between the products of the parties.

2. That plaintiff-cross-defendants be required to account for and pay over to defendant-counter-claimant all of the gains, profits and advantages derived by said plaintiff-cross-defendants, and each of them, by reason of the infringements and acts of unfair competition alleged in this counter-claim, together with all damages to defendant-counter-claimant resulting therefrom, the amount thereof to be trebled because of the deliberate and wilfull nature of the infringing and unfair acts.

3. That defendant-counter-claimant recover from plaintiff-counter-defendants its costs and disbursements of suit, including attorney's fees.

4. That defendant-counter-claimant have such other and further relief as is just and proper in the premises.

NANCY ANN STORYBOOK
DOLLS, INC.
(A Corporation.)

By /s/ HUGH N. ORR,
/s/ CHARLES S. EVANS,
Its Attorneys.

Duly verified.

[Endorsed]: Filed December 5, 1949.

[Title of District Court and Cause.]

ORDER FOR ISSUANCE OF SUMMONS

Defendant having presented its verified answer and counter-claim in the above-entitled action alleging claims as to which plaintiff corporation and certain officers of plaintiff corporation are charged to be jointly and/or severally liable; and good cause therefore appearing, it is hereby

Ordered:

That summons be issued directed to the following named individuals:

Lester E. Hinz, of Los Gatos, Santa Clara County, Calif.,

Robert E. Kerr, of San Carlos, San Mateo County, Calif., officers of plaintiff corporation, requiring that they appear as plaintiffs and counter-defendants. and answer defendant's counter-claim in conformity with the Federal Rules of Court Procedure.

December 5th, 1949.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed December 5, 1949.

Not issued at request of counsel.

[Title of District Court and Cause.]

MOTION TO VACATE ORDER OR IN THE
ALTERNATIVE TO DISMISS COUNTER-
CLAIM

Come Now Lester F. Hinz and Robert E. Kerr, named as counter-defendants in the above-entitled action, and request this Court for an order vacating the order of December 5, 1949, authorizing issuance of summons against said Lester F. Hinz and Robert E. Kerr or, in the alternative, for an order dismissing the counterclaim against said Lester F. Hinz and Robert E. Kerr.

The grounds of said motion for an order vacating the order of December 5, 1949, are: -

I.

That said order is improper under Rule 13(h), Federal Rules of Civil Procedure.

II.

That the request for said order of December 5, 1949, was unsupported by any factual showing demonstrating that said Lester F. Hinz or Robert E. Kerr are necessary parties to the granting of complete relief to defendant.

The grounds of said motion for an order to dismiss are:

1. That the counterclaim does not state facts to constitute a cause of action against said Lester F. Hinz or Robert E. Kerr.

2. That the counterclaim sets forth no allegations of fact to establish individual trade-mark infringement by said Lester F. Hinz or Robert E. Kerr.

3. That the deposition of Allan F. Rowland, Secretary-Treasurer of defendant Co. establishes that there are no facts in support of the counterclaim which can raise a justiciable issue between defendant and said Lester F. Hinz or Robert E. Kerr.

This motion will be based upon all of the papers on file herein and the deposition of Allan F. Rowland and affidavits of Lester F. Hinz, Robert E.

Kerr and Elise Juster and the memorandum in support of said motion on file herein.

Dated December 27, 1949.

MELLIN AND HANSCOM,

By /s/ JACK E. HURSH.

[Endorsed]: Filed December 27, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF LESTER F. HINZ

(Jan. 20, 1950)

State of California,

City and County of San Francisco—ss.

Lester F. Hinz, being first duly sworn, deposes and says:

That he is the Lester F. Hinz who previously made an affidavit in this action, dated November 18, 1949, on file herein; that all of the allegations made therein are true and correct with the exception that affiant in his previous affidavit made an error in the ownership of stock in plaintiff, Dollcraft Co.; that said prior affidavit, starting on page 2, line 18 after the comma, to page 2, line 21 to semi-colon, should read; "was issued fifteen (15) shares, Lester F. Hinz; fifteen (15) shares, Robert E. Kerr; ten (10) shares, Richard Mollison; ten (10) shares Maurice Juster and ten (10) shares, Elise Juster."

That thereafter additional financing of said plaintiff company was necessary and in return for said financing on February 16, 1949, additional stock in plaintiff corporation was issued as follows: Lester F. Hinz, seventeen (17) shares and Robert E. Kerr, thirteen (13) shares; that an additional correction should be made to the said affidavit of November 18, 1949, on page 4, line 7, after the comma, to page 4, line 15, to the semi-colon; that said affidavit should at that point read as follows. "that in March, 1945, Lester F. Hinz, affiant, was approached by Robert E. Kerr who was seeking to obtain bisque dolls so that said Robert E. Kerr and an associate, Robert Patterson, could engage in the business of decorating and selling undressed dolls which had become difficult to obtain because of war conditions and the cessation of the imports of such dolls; that it was some time in May, 1945, when it was agreed by and between affiant and said Robert E. Kerr that they would form a co-partnership, known as Kerr & Hinz, for the purpose of decorating, finishing and packaging doll bodies and that said Robert Patterson would have exclusive sales rights to the products produced by said Kerr & Hinz;"

That said errors in said prior affidavit were made through inadvertence or mistake and were not intentional.

/s/ LESTER F. HINZ.

Subscribed and sworn to before me this 20th day of January, 1950.

[Seal] /s/ HELEN KETTERBAUGH,
Notary Public in and for the County of San Francisco, State of California.

[Endorsed]: Filed February 4, 1950.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 6th day of February, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

MINUTE ORDER

This case came on regularly this day for hearing on motion to vacate order, or in the alternative, to dismiss counter-claim. After hearing J. Hursh, Esq., for plaintiff, and H. Orr, Esq., for defendant, it is Ordered that said motion be denied without prejudice to renewal at time of trial.

[Title of District Court and Cause.]

ANSWER TO COUNTER-CLAIM

Come now the plaintiffs-counter-defendants above-named and, for their answer to the counter-claim herein, admit, deny and aver as follows:

I.

Answering Paragraph I of the counter-claim, plaintiffs-counter-defendants admit the allegations therein contained.

II.

Answering Paragraph II of the counter-claim, plaintiffs-counter-defendants admit the allegations therein contained.

III.

Answering Paragraph III of the counter-claim, plaintiffs-counter-defendants admit that Lester F. Hinz is a resident of Los Gatos, County of Santa Clara, State of California; and is President of plaintiff, Dollcraft Co., and that said Lester F. Hinz owns the Myers Ceramic Products Co., and is a copartner in Kerr and Hinz Doll Company, both of which organizations have a place of business in Santa Clara, County of Santa Clara, State of California; but except for the allegations herein specifically admitted, plaintiffs-counter-defendants deny each and every, all and singular, the other allegations contained in said Paragraph III.

IV.

Answering Paragraph IV of the counter-claim,

plaintiffs-counter-defendants admit that Robert E. Kerr is a resident of San Carlos, County of San Mateo, State of California; and is Vice-President of plaintiff, Dollcraft Co., and that said Robert E. Kerr is a copartner in the firm of Kerr and Hinz Doll Company; but except for the matters herein specifically admitted, plaintiffs-counter-defendants deny each and every, all and singular, the other allegations contained in said Paragraph IV.

V.

Answering Paragraph V of the counter-claim, plaintiffs-counter-defendants admit that the counter-claim is for alleged infringement of trade-mark rights alleged to be owned by defendant-counter-claimant and arising under the trade-mark laws of the United States; but except for the matter herein specifically admitted, plaintiffs-counter-defendants deny each and every, all and singular, the allegations therein contained.

VI.

Answering Paragraph VI of the counter-claim, plaintiffs-counter-defendants admit that defendant-counter-claimant and its predecessors have been and now are engaged in the business of manufacturing and selling dressed dolls; but except for the matters herein specifically admitted, plaintiffs-counter-defendants deny each and every, all and singular, the other allegations contained in said Paragraph VI.

VII.

Answering Paragraph VII of the counter-claim, plaintiffs-counter-defendants admit that the United States Patent Office issued the following trade-mark registrations:

"Red Riding Hood"	Registration No. 420,007
	March 26, 1946
"Little Miss Muffett" . . .	Registration No. 432,208
	August 26, 1947
"Little Bo-Peep"	Registration No. 395,454
	May 26, 1942
"Mistress Mary"	Registration No. 404,576
	Dec. 7, 1943
"Little Miss Donnett" . . .	Registration No. 404,586
	Dec. 7, 1943
"Curley Locks"	Registration No. 404,581
	Dec. 7, 1943
"Goldilocks"	Registration No. 395,451
	May 26, 1942
"Sugar and Spice"	Registration No. 403,240
	Sept. 14, 1943
"Storybook"	Registration No. 389,114
	July 22, 1941
"Fairyland Dolls"	Registration No. 438,495
	April 27, 1948
"June Girl"	Registration No. 403,261
	Sept. 14, 1943

Except for the matters herein specifically admitted, plaintiffs-counter-defendants deny each and every, all and singular, the other allegations contained in said Paragraph VII.

VIII.

Answering Paragraph VIII of the counter-claim, plaintiffs-counter-defendants deny the allegations therein contained.

IX.

Answering Paragraph IX of the counter-claim, plaintiffs-counter-defendants deny the allegations therein contained.

X.

Answering Paragraph X of the counter-claim, plaintiffs-counter-defendants deny the allegations therein contained.

XI.

Answering Paragraph XI of the counter-claim, plaintiffs-counter-defendants deny each and every, all and singular, the allegations contained in said Paragraph XI; and aver that plaintiff-counter-defendant, Dollcraft Co., has produced dolls depicting its conception of nursery rhyme characters and has identified said dolls with the nursery rhyme names which aptly describe the dolls.

XII.

Answering Paragraph XII of the counter-claim, plaintiffs-counter-defendants deny the allegations therein contained.

XIII.

Answering Paragraph XIII of the counter-claim, plaintiffs-counter-defendants deny the allegations therein contained.

XIV.

Answering Paragraph XIV of the counter-claim, plaintiffs-counter-defendants deny the allegations therein contained.

XV.

Answering Paragraph XV of the counter-claim, plaintiffs-counter-defendants deny the allegations therein contained.

XVI.

Answering Paragraph XVI of the counter-claim, plaintiffs-counter-defendants admit that Lester F. Hinz made and supplied to defendant-counter-claimant's predecessors bisque doll bodies during the period of approximately from January, 1943, to May, 1945; but except for the matters herein specifically admitted, plaintiffs-counter-defendants deny each and every, all and singular, the other allegations contained in said Paragraph XVI.

XVII.

Answering Paragraph XVII of the counter-claim, plaintiffs-counter-defendants admit that Robert E. Kerr was employed by defendant-counter-claimant's predecessors during the period of approximately from January, 1941, to June, 1944; but except for the matters herein specifically admitted, plaintiffs-counter-defendants deny each and every, all and singular, the other allegations contained in said Paragraph XVII.

XVIII.

Answering Paragraph XVIII of the counter-claim, plaintiffs-counter-defendants deny the allegations therein contained.

XIX.

Answering Paragraph XIX of the counter-claim, plaintiffs-counter-defendants deny the allegations therein contained.

XX.

Answering Paragraph XX of the counter-claim, plaintiffs-counter-defendants deny the allegations therein contained.

As Further and Separate Defenses Plaintiffs-Counter-Defendants Aver:

XXI.

That plaintiff-counter-defendant, Dollcraft Co., for many years last past has been and now is engaged in the business of designing, manufacturing and selling children's dolls of various types and designs, including a group of dolls which plaintiff-counter-defendant, Dollcraft Co., designates its "Fairyland Series" designed and decorated to depict and visually correspond with and represent various well-known characters referred to in fairy tales, Mother Goose and other nursery rhymes; for example:

"Red Riding Hood"

"Little Miss Muffett"

"Little Bo-Peep"

"Mistress Mary"

"Little Miss Donnett"

"Curley Locks"

"Goldilocks"

"Sugar and Spice"

XXII.

That the container for each of such dolls is inscribed with the well-known name of the character which it represents and depicts, and also on such container is prominently displayed the trade-mark and name of the plaintiff-counter-defendant, Dollcraft Co.

XXIII.

That plaintiff-counter-defendant, Dollcraft Co., has built up an extensive and lucrative business in such dolls so named, and has established and enviable and valuable good will therein, which business and good will is in excess of One Hundred Thousand Dollars (\$100,000.00).

XXIV.

That defendant-counter-claimant has contended and now contends that it has the exclusive right and monopoly of, designating dolls depicting and representing fairy tale, Mother Goose and other nursery rhyme characters by the well-known names given such characters in such fairy tale, Mother Goose and other nursery rhymes, and further contends that the names of such characters as given in such fairy tale, Mother Goose and other nursery rhymes are the exclusive property and exclusive trade-marks of this defendant-counter-claimant; the well-known names of such fairy tale, Mother Goose and other nursery rhyme characters so claimed to be the exclusive property and trade-marks of defendant-counter-claimant, among others, are as follows:

“Red Riding Hood”
“Little Miss Muffett”
“Little Bo-Peep”
“Mistress Mary”
“Little Miss Donnett”
“Curley Locks”
“Goldilocks”
“Sugar and Spice”

XXV.

That defendant-counter-claimant, with the calculated intent and purpose of destroying the good will and business of the plaintiff-counter-defendant, Dollcraft Co., in its aforesaid dolls, has heretofore, in writing, notified valuable customers of plaintiff-counter-defendant, Dollcraft Co., to forthwith desist from naming, designating or advertising plaintiff-counter-defendant, Dollcraft Co.’s, such dolls by the said well-known fairy tale, Mother Goose and nursery rhyme names of the characters which such dolls depict and represent, as aforesaid, which names are as follows:

“Red Riding Hood”
“Little Miss Muffett”
“Little Bo-Peep”
“Mistress Mary”
“Little Miss Donnett”
“Curley Locks”
“Goldilocks”
“Sugar and Spice”

and has threatened said customers with litigation in

the event that they refused to forthwith and immediately desist from so doing.

XXVI.

That defendant-counter-claimant, well knowing that it had no exclusive right to use the said names of the said characters in fairy tales, story books, Mother Goose and other nursery rhymes, and with the intent to deceive and defraud the customers of plaintiff-counter-defendant, Dollcraft Co., and to defraud the plaintiff-counter-defendant, Dollcraft Co., and to destroy plaintiff-counter-defendant, Dollcraft Co.'s, said business, did threaten such customers with litigation because of the use by such customers of the names of characters in fairy tales, story books, Mother Goose and other nursery rhymes in connection with dolls representing and depicting such characters.

XXVII.

That plaintiff-counter-defendant, Dollcraft Co., is informed and believes and on information and belief alleges that such notification and threatening, as aforesaid, by defendant-counter-claimant of the said plaintiff-counter-defendant, Dollcraft Co.'s, valuable customers, is part of a calculated plan on the part of the defendant-counter-claimant to unlawfully destroy the plaintiff-counter-defendant, Dollcraft Co.'s, said business in said dolls, and thereby unlawfully eliminate legal and proper competition by the plaintiff-counter-defendant, Dollcraft Co.

XXVIII.

That plaintiff-counter-defendant, Dollcraft Co., is informed and believes and on information and belief alleges that unless restrained by this Court, defendant-counter-claimant will continue to so improperly and unfairly compete with plaintiff-counter-defendant, Dollcraft Co., by threatening customers of the plaintiff-counter-defendant, Dollcraft Co., with litigation if they continue to sell the doll products of the plaintiff-counter-defendant, Dollcraft Co., all to the irreparable injury and damage of the plaintiff-counter-defendant, Dollcraft Co.

XXIX.

That the said acts of the defendant-counter-claimant in so harrassing plaintiff-counter-defendant, Dollcraft Co., by threatening the customers of the plaintiff-counter-defendant, Dollcraft Co., with litigation because of their advertising and sale of plaintiff-counter-defendant Dollcraft Co.'s said doll products, as aforesaid, constitute acts of unfair competition in trade, and such acts have diminished the good will and business of the plaintiff-counter-defendant, Dollcraft Co., and plaintiff-counter-defendant, Dollcraft Co. has been damaged by such acts of unfair competition by defendant-counter-claimant in an amount which plaintiff-counter-defendant, Dollcraft Co., cannot at this time accurately determine, but is informed and believes and on information and belief alleges is in an amount in excess of Ten Thousand Dollars (\$10,000.00).

XXX.

That plaintiff-counter-defendant, Dollcraft Co., is informed and believes and on information and belief alleges that each and every of the said trade-mark registrations claimed to be owned by the defendant-counter-claimant and heretofore set out herein are invalid and were fraudulently and unlawfully obtained, in that the alleged words or phrases so registered are not trade-marks and are incapable of being exclusively appropriated.

XXXI.

That plaintiff-counter-defendant, Dollcraft Co., is informed and believes and on information and belief alleges that unless such trade-mark registrations as heretofore set forth are declared to be invalid by this Court, the defendant-counter-claimant will continue to hold itself out to the trade as being entitled to the exclusive use of the words and phrases claimed to be trade-marks in such registrations, and will continue to threaten the trade with litigation should the trade use the names of characters in well-known fairy tale, Mother Goose and nursery rhyme names to identify dolls depicting and representing such characters, all to the injury and damage of the plaintiff-counter-defendant, Dollcraft Co.

XXXII.

That when the names of the various characters in fairy tales, story books, Mother Goose and other nursery rhymes are used in connection with dolls depicting and representing such characters, such

names are not used in a trade-mark sense but merely in a descriptive and primary sense.

XXXIII.

That the names of the various characters in fairy tales, story books, Mother Goose and other nursery rhymes, when used to designate and identify such characters, are publici juris and incapable of being exclusively appropriated by defendant-counter-claimant as its trade-marks for dolls depicting and representing such characters.

XXXIV.

That the names of the various characters in fairy tales, story books, Mother Goose and other nursery rhymes, when applied to dolls depicting and representing such characters, are clearly descriptive and are not capable of being lawfully exclusively appropriated as trade-marks or trade names.

XXXV.

That plaintiff-counter-defendant, Dollcraft Co., does not use the fairy tale, Mother Goose and other nursery rhyme names of characters which its dolls depict and represent as trade-marks or trade names, but uses said names in their primary sense to describe such dolls.

XXXVI.

That plaintiff-counter-defendant, Dollcraft Co., has not infringed upon any trade-mark rights of defendant-counter-claimant.

Wherefore Plaintiffs-Counter-Defendants Pray:

1. For a judgment dismissing the counter-claim.
2. That the Court adjudge and declare that the plaintiffs-counter-defendants have not infringed any trade-mark rights of the defendant-counter-claimant.
3. That the Court adjudge and declare that the plaintiffs-counter-defendants have not unfairly competed with the defendant-counter-claimant.
4. That the Court adjudge and declare that the defendant-counter-claimant has committed acts of unfair competition against the plaintiffs-counter-defendants.
5. That the Court declare the following trade-mark registrations to be invalid and of no legal force and effect:
 - “Red Riding Hood” Registration No. 420,007
March 26, 1946
 - “Little Miss Muffett” . . . Registration No. 432,208
August 26, 1947
 - “Little Bo-Peep” Registration No. 395,454
May 26, 1942
 - “Mistress Mary” Registration No. 404,576
Dec. 7, 1943
 - “Little Miss Donnett” . . . Registration No. 404,586
Dec. 7, 1943
 - “Curley Locks” Registration No. 404,581
Dec. 7, 1943
 - “Goldilocks” Registration No. 395,451
May 26, 1942

“Sugar and Spice” Registration No. 403,240
Sept. 14, 1943

“Storybook” Registration No. 389,114
July 22, 1941

6. That the Court adjudge and declare that the defendant-counter-claimant has no exclusive right to designate dolls representing the following characters in fairy tale, Mother Goose and other nursery rhymes by the well-known names given them in such fairy tale, Mother Goose and other nursery rhymes:

“Red Riding Hood”

“Little Miss Muffett”

“Little Bo-Peep”

“Mistress Mary”

“Little Miss Donnett”

“Curley Locks”

“Goldilocks”

“Sugar and Spice”

7. That plaintiffs-counter-defendants be awarded the sum of Twenty-five Thousand Dollars (\$25,000.00) as exemplary damages for the malicious, wanton and unfair interference with the business of plaintiffs-counter-defendants.

8. For an accounting of the actual damages sustained by the plaintiffs-counter-defendants because of the acts of unfair competition committed by this defendant-counter-claimant.

9. That plaintiffs-counter-defendants have their costs and disbursements herein.

10. For a permanent injunction enjoining the defendant-counter-claimant, its associates, partners, attorneys, clerks, servants, agents, employees and confederates, and all in privity with them, and each of them,

(a) from notifying any of plaintiffs-counter-defendants' customers, dealers or any present or prospective sellers, dealers or users of plaintiffs-counter-defendants' aforesaid dolls that the sale, offering for sale or advertisement of plaintiffs-counter-defendants' said dolls violates any rights of this defendant-counter-claimant;

(b) from notifying any of plaintiffs-counter-defendants' customers, dealers or any present or prospective sellers, dealers or users of plaintiffs-counter-defendants' aforesaid dolls that the defendant-counter-claimant has the exclusive right to designate dolls by any of the aforesaid names;

(c) from notifying any of plaintiffs-counter-defendants' customers, dealers or any present or prospective sellers, dealers or users of plaintiffs-counter-defendants' aforesaid dolls that they will be sued for trade-mark infringement in the event that they sell, offer for sale or advertise any of plaintiffs-counter-defendants' aforesaid dolls;

(d) from commencing in this or in any other Court against any of the customers or dealers or any prospective customer or dealer of plaintiffs-counter-defendants any suit for alleged trade-mark infringement or unfair competition because of the selling, offering for sale, or advertising any of plaintiffs-counter-defendants' dolls herein set forth.

11. That plaintiffs-counter-defendants shall have such other, further or different relief as the Court may deem appropriate in the premises.

Dated this 15th day of February, 1950.

MELLIN, HANSCOM &
HURSH,

By /s/ JACK E. HURSH,
Attorneys for Plaintiffs-
Counter-Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 15, 1950.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Actions seeking to determine the validity of certain trade-marks, for injunctive relief because of trade-mark infringements and unfair competition, for damages and for other relief. Judgment in accordance with opinion.

Mellin, Hanscom & Hursh, Oscar A. Mellin, Leroy Hanscom, and Jack E. Hursh, all of San Francisco, California, attorneys for plaintiffs-counter-defendants.

Hugh N. Orr and William G. McKay, both of San Francisco, California, attorneys for defendant-counter-claimant.

Roche, Chief Judge:

By this action plaintiffs seek the cancellation of

certain trade-marks registered by the defendant in the U. S. Patent Office, injunctive relief, damages and other relief. Defendant counter-claims, seeking relief from trade-mark infringement, injunctive relief, damages and other relief.

Plaintiff and counter-defendant Dollcraft Co. is now, and has been since 1946, a manufacturer and seller of miniature, dressed dolls. In 1948, Dollcraft began producing a series of eight dolls, each named "Who Am I?" and each dressed to represent some familiar character in children's fiction, such as "Red Riding Hood," "Little Miss Muffett" and "Little Bo-Peep." Shortly after its introduction this series was named the "Fairyland Series," a name apparently adopted from the short verse printed on Dollcraft's price lists and brochures of that period, and which contained the lines:

"I Am a Little Friend of Yours, Fairyland
Is Where I Dwell."

Within the same year of 1948, this series was increased to twelve dolls, each identified by the name of a particular fictional character or nursery rhyme personification which the doll was dressed to represent and comprising "Red Riding Hood," "Little Miss Muffett," "Little Miss Donnett," "Little Bo-Peep," "Mistress Mary," "Alice in Wonderland," "Rapunzel," "Gretel," "Curly Locks," "Goldilocks," "Sugar and Spice," and "Bessie Brooks."

Dollcraft also makes a doll dressed as a bride which is sold under the name of "June Bride."

Dollcraft first packaged its dolls in individual cardboard boxes which had a red top and a white

bottom. It later began using, and now uses, a box consisting of a white bottom with a transparent, acetate top and also, for one series of dolls, individual, glass bottle containers.

During the first few months of its existence, Dollcraft applied no names of identification to its products. Beginning in 1946 or 1947, it applied to the red-topped boxes a gummed label or seal on which the following words appeared: "Globe Trotters. Doll-Craft Co., San Francisco, California." Later, the boxes were rubber-stamped with the words, "Dollcraft Company, Santa Clara, California." The lids of the glass containers have, since they were first used in 1949, contained the words, "Dolls With a Story by Dollcraft, Santa Clara, California."

Defendant and counter-claimant Nancy Ann Storybook Dolls, Inc., (hereafter referred to as Nancy Ann) is now, and has been since 1937, also a manufacturer and seller of miniature, dressed dolls.

Since 1941 Nancy Ann has applied the words "Storybook Dolls by Nancy Ann" to its complete line of dolls. Nancy Ann registered the word "Storybook" with the U. S. Patent Office in 1941 as a trade-mark for dolls, doll clothes and doll furniture and the word "Story" in 1950 as a trade-mark for dressed dolls.

Nancy Ann has, since its inception, made and sold certain dolls to which it applies the names of "Red Riding Hood," "Little Miss Muffet," "Little Bo-Peep," "Mistress Mary," "Curly Locks," and

“Goldilocks.” It has also made and sold a doll named “Sugar and Spice” since about 1940 and one named “Little Miss Donnett” since about 1941. Nancy Ann has registered all of these names with the U. S. Patent Office, between 1942 and 1947, as trade-marks for dolls and doll clothes or for dressed dolls. From about 1938 until about 1946, all of its dolls of these names were sold under the series name of “Storybook Series” (spelled as “Story Book” until about 1940). Since about 1946, these same dolls have been included within either the “Fairytale Series,” the “Fairylend Series,” or the “Mother Goose Series.” The name “Fairylend” was registered with the U. S. Patent Office in 1948, as a trade-mark for dressed dolls.

Since about 1941, Nancy Ann has also made a doll sold under the name of “June Girl,” which name was registered in the U. S. Patent Office in 1943 as a trade-mark for dolls and doll clothes.

Nancy Ann packages its dolls in individual, white, cardboard boxes, printed on which, in multiple, diagonal lines, are the words “Nancy Ann Storybook Dolls,” between which lines are additional, parallel lines of large polka dots, with both the words and the polka dots printed in a single color.

In October, 1949, two retail stores advertised Dollcraft dolls, including “Red Riding Hood,” “Little Bo-Peep,” and “Sugar and Spice,” under the names of “Story Dolls” and “Story Book Dolls.” Immediately thereafter, Nancy Ann served notices of alleged trade-mark infringements upon Dollcraft and certain customers of Dollcraft, in-

cluding the two stores which had so advertised. With such notice, Nancy Ann demanded that the infringements and unfair competition cease and that accounting be made for all profits derived from such practices.

Dollcraft thereupon instituted this suit, denying that the names "Red Riding Hood," "Little Miss Muffett," "Little Bo-Peep," "Mistress Mary," "Curly Lock," "Goldilocks," "Sugar and Spice," "Little Miss Donnett," "June Girl," "Story," "Storybook" and "Fairyland" are valid trade-marks which Nancy Ann may exclusively appropriate and alleging, therefore, that Nancy Ann's notices of infringements constitute unfair competition. Nancy Ann relies on the validity of all of its registered trade-marks which are in issue here.

The issue for decision is whether Nancy Ann is entitled to the exclusive use of the names involved, either by reason of their being valid trade-marks or under the doctrine of secondary meaning.

While the registration of a name or term as a trade-mark raises a presumption of its legality, *Brooks Bros. v. Brooks Clothing of Calif.*, 60 F.S. 442, 447, 65 U.S.P.Q. 301, 308, the mere registration does not establish that name or term as a valid trade-mark, for such presumption is rebuttable. *National Nu Grape Co. v. Guest*, 164 F. (2d) 874, 876.

The purpose of a trade-mark is to distinguish the goods of one person from those of another, *Standard Paint Co. v. Trinidad*, 220 U. S. 447, 453, and its primary and proper function is to identify the

origin or ownership of the article to which it is affixed. *Hanover Milling Co. v. Metcalf*, 240 U. S. 403, 412. It must be of such a nature as to permit of an exclusive appropriation by one person, *Barton v. Rex-Oil Co.*, 2 F. (2d) 402, 403, for unless the trade-mark performs its proper function, neither can the first adopter of it be injured by any appropriation or imitation of it by others, nor can the public be deceived. *Canal Co. v. Clark*, 80 U. S. 311, 323.

The names "Fairyländ" and "Sugar and Spice" serve such purpose and function and are capable of exclusive appropriation; they are, therefore, valid trade-marks.

"Sugar and Spice" is a phrase abstracted from an old, familiar, nursery rhyme, possessing a meaning in its context, but none when used as the name of a doll. "Fairyländ" means the land or abode of fairies, who are imaginary, supernatural beings; Nancy Ann uses this word as a name for dolls which, while they may portray fictional characters, are neither representations nor likenesses of fairies. At most, these names may be suggestive (see *Nims on Unfair Competition*, 3d Ed., §201), but they are not descriptive; they possess, in their use by Nancy Ann, only connotation and not denotation; they are arbitrary and fanciful names and thus valid trade-marks. *Palmer v. Gulf Pub. Co.*, 79 F.S. 731, 734; see also *Stork Restaurant v. Sahati*, 166 F. (2d) 348, 355, 76 U.S.P.Q. 374, 379.

The leading case of *Canal Co. v. Clark*, *supra*, at p. 323, establishes two rules which must not be

overlooked: "No one can claim protection for the exclusive use of a trade-mark or trade name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark and the exclusive use of it be entitled to legal protection." This Court finds that all of the other names claimed and registered as trade-marks by Nancy Ann, and which are in issue here, are incapable, inherently and because of the two rules just expressed, of functioning as valid trade-marks in their application by Nancy Ann.

Dollcraft claims the right to use the names of "Red Riding Hood," "Little Bo-Peep," "Little Miss Muffett," "Mistress Mary," "Little Miss Donnett," "Curly Locks," and "Goldilocks" because such names are descriptive of its dolls. Nancy Ann, while admitting the right of Dollcraft to make dolls portraying such fictional characters, claims the exclusive right to the use of these names as valid trade-marks.

The dolls produced by each party show themselves to have been designed, created and dressed so as to be the likeness of the fictional character whose name they bear. Each doll of such name is a manifestation of the fictional character itself, whose name serves to identify and describe such doll. These

names, as so applied, are descriptive; their use belongs to everyone and Nancy Ann cannot be given the right of their exclusive appropriation.

Nancy Ann claims that "June Girl" is infringed by Dollcraft's use of the name "June Bride," contending, even, that the word "June" may not be so used by others. The "June Girl" doll, on examination, shows itself to be a conceptual representation of a girl dressed for the month of June. It is not dressed in a bridal costume, rather it is clothed in light, summery dress, appropriate to an embodiment of the name itself. The name denotes the doll, not the manufacturer; it is a descriptive name, invalid as a trade-mark. Even were this Court to find "June Girl" a valid trade-mark, however, there is insufficient evidence to hold that "June Bride" constitutes either an infringement of "June Girl" or an unfair use of the word "June."

"Story" or "Story Book" properly serve as generic names for all that class of dolls which portray or represent fictional characters, as does the name "Dolls With a Story." Each of these names which is used by Nancy Ann serves the adjectival function of correctly describing such a class of dolls and both are likewise invalid as trade-marks.

As to all of the above names here held invalid as trade-marks, the language of the Canal Co. case, *supra*, at p. 328 and p. 324, may be paraphrased to say that the dolls produced by Nancy Ann are as truly described by these names, as are the dolls

produced by Dollcraft or by Hallmark Cards.¹ The names are descriptive ones which do not point to the origin or ownership, nor indicate in the slightest degree the person, natural or artificial, who manufactured such dolls or brought them to market. As so applied, all of the above names are incapable of performing the function of a trade-mark; they are not susceptible of exclusive appropriation by one party for they are names which, from the nature of the fact they are used to signify, may be employed by others with equal truth and with equal right for the same purpose.

The evidence is insufficient to hold that any of these names, found not to be trade-marks proper, have acquired a secondary meaning denoting Nancy Ann as the source of the dolls to which they are applied.

Evidence that a retailer sold Dollcraft dolls under the name of Story Book Dolls is proof only of the sales and not of the issue in question. Advertising is the effort expended in the attempted achievement and not the achievement of the alleged result (i.e., secondary meaning); a large sales volume may be no more than the success resulting from methods of sales promotion. These factors, as well as the fact of the length of time that Nancy Ann has used such names, in the absence of sufficient evidence tending to show that such names have become known to the public or to

¹Introduced into evidence were certain paper dolls manufactured by Hallmark Cards, some of which are named "Little Miss Muffett," "Little Bo-Peep," and "Little Red Riding Hood."

dealers as denoting a product of Nancy Ann's, are found not to meet the burden of proof necessary to establish secondary meanings.

Because both parties are producing dolls of similar size and common conception, there is a natural resemblance between their products. Lacking, however, are the usual indicia of fraud or palming off on the part of Dollcraft. The evidence fails to show that Dollcraft has represented, by marks, signs, labels, colors, packages, or in any other way, that its dolls are manufactured by Nancy Ann; on the contrary, the evidence shows that Dollcraft identifies its products by its own name, clearly and unmistakably. It may be said of Dollcraft's use of these names (here found to be descriptive) which have been in prior use by Nancy Ann, " * * * that the use by a second producer, in describing truthfully his product, of a name or combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product, but if it is just as true in its application to his goods as it is to those of another who first applied it, and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth." *Canal Co. v. Clark*, *supra*, at p. 327. Since it is found that the dissimilarities outweigh the similarities of their products and since fair competition is to be encouraged, the Court finds no reason to enjoin Dollcraft from the use of these descriptive names.

Under the circumstances, this Court is of the opinion that it would be inequitable to award an accounting in favor of, or against, either party.

In accordance with the foregoing and upon findings of fact and conclusions of law in accordance therewith, it is, therefore

Ordered:

(1) That the following trade-mark registrations be cancelled:

No. 389114—"Storybook"

395451—"Goldilocks"

395454—"Little Bo-Peep"

403261—"June Girl"

404576—"Mistress Mary"

404581—"Curly Locks"

404586—"Little Miss Donnett"

420077—"Red Riding Hood"

432208—"Little Miss Muffett"

525896—"Story";

(2) That there be issued a writ of injunction perpetually restraining plaintiffs from infringing the names "Sugar and Spice" and "Fairyland"; and

(3) That there be issued a writ of injunction perpetually restraining defendant from interfering with plaintiffs' use of those names which are here ordered cancelled as registered trade-marks.

Dated Nov. 30th, 1950.

/s/ MICHAL J. ROCHE,

Chief United States District
Judge.

[Endorsed]: Filed November 30, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Pursuant to Rule 52 of the Federal Rules of Civil Procedure and Rule 5(e) of the Rules of Practice of the District Court of the United States for the Northern District of California, the Court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1.

Plaintiff-counter-defendant, Dollcraft Co., is a corporation, duly organized and existing under and by virtue of the laws of the State of California and having its principal place of business at Santa Clara, County of Santa Clara, State of California.

2.

Plaintiff-counter-defendant, Lester F. Hinz, an individual, is a resident of Santa Clara County, State of California.

3.

Plaintiff-counter-defendant, Robert E. Kerr, an individual, is a resident of San Mateo County, State of California.

4.

Defendant-counter-claimant, Nancy Ann Story-book Dolls, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of San Francisco, State of California.

5.

Defendant-counter-claimant is the owner of all the right, title and interest in, to and under the following United States trade-mark registrations:

- “Red Riding Hood” Registration No. 420,007
March 26, 1946
- “Little Miss Muffett” . . . Registration No. 432,208
August 26, 1947
- “Little Bo-Peep” Registration No. 395,454
May 26, 1942
- “Mistress Mary” Registration No. 404,576
December 7, 1943
- “Little Miss Donnett” . . . Registration No. 404,586
December 7, 1943
- “Curly Locks” Registration No. 404,581
December 7, 1943
- “Goldilocks” Registration No. 395,451
May 26, 1942
- “June Girl” Registration No. 403,261
September 14, 1943
- “Storybook” Registration No. 389,114
July 22, 1941
- “Story” Registration No. 525,896
June 6, 1950
- “Fairylend” Registration No. 438,495
April 27, 1948
- “Sugar and Spice” Registration No. 403,240
September 14, 1943

6.

The plaintiff-counter-defendant, Dollcraft Co., is now and has been since 1946, a manufacturer and

seller of miniature dressed and undressed bisque dolls.

7.

Plaintiff-counter-defendant, Dollcraft Co., in 1948 began producing a series of eight (8) dolls, each named "Who Am I?" and each dressed to represent a familiar storybook character in children's fiction, such as Red Riding Hood, Little Miss Muffett, and Bo-Peep.

8.

Within the same year, 1948, plaintiff-counter-defendant, Dollcraft Co., increased this series to twelve (12) dolls, each identified by the name of a particular storybook fictional character or nursery rhyme personification which the doll was dressed to represent and comprising "Red Riding Hood," "Little Miss Muffett," "Little Miss Donnett," "Little Bo-Peep," "Mistress Mary," "Alice in Wonderland," "Rapunzel," "Gretel," "Curly Locks," "Goldilocks," "Sugar and Spice," and "Bessie Brooks."

9.

Plaintiff-counter-defendant, Dollcraft Co., makes a doll dressed as a bride which is sold under the name of "June Bride."

10.

Defendant-counter-claimant is now and has been since 1937 a manufacturer and seller of miniature dressed dolls.

11.

Defendant-counter-claimant, since 1949, has ap-

plied the words "Storybook Dolls by Nancy Ann" to its complete line of dolls.

12.

Defendant-counter-claimant has, since its inception, made and sold certain dolls to which it applies the names "Red Riding Hood," "Little Miss Muffett," "Little Bo-Peep," "Mistress Mary," "Curly Locks," and "Goldilocks," and since 1940 has made and sold a doll named "Sugar and Spice" and also since 1941 has made and sold a doll named "Little Miss Donnett."

13.

"Sugar and Spice" is a phrase abstracted from an old, familiar nursery rhyme, possessing a meaning in its context, but none when used as the name of a doll.

14.

Defendant-counter-claimant from 1938 until about 1946 sold dolls to which it applied the names "Red Riding Hood," "Little Miss Muffett," "Little Bo-Peep," "Mistress Mary," "Curly Locks," "Goldilocks," "Sugar and Spice," and "Little Miss Donnett," under the series name of "Storybook Series" (spelled as "Story Book" until about 1940).

15.

Defendant-counter-claimant, since about 1941, has made and sold a doll under the name of "June Girl."

16.

The dolls produced by each party herein show

themselves to have been designed, created and dressed so as to be the likenesses of well-known fictional characters whose names they bear.

17.

Each doll bearing the trade-marks here in issue is a manifestation of the fictional character itself whose name serves to identify and describe such doll.

18.

"Story" and "Storybook" properly serve as generic names for all that class of dolls which portray or represent fictional characters, as does "Dolls With a Story."

19.

The use which defendant-counter-claimant makes of the words "Storybook Dolls" to identify the dolls indicate that such dolls represent characters in storybooks.

20.

The names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story" are primarily descriptive and cannot be withdrawn from public use by adoption as a trade-mark.

21.

The defendant-counter-claimant's purpose in acquiring the names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Rid-

ing Hood," "Little Miss Muffett," and "Story" to dolls was simply to describe the name of the particular character which said dolls were designed to portray and represent and were not applied to the dolls to serve in a trade-mark function.

22.

The names "Story" and "Storybook" used by defendant-counter-claimant serves the adjectival function of correctly describing such a class of dolls. The dolls produced by Nancy Ann, bearing the names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story" are as truly described by these names as are the dolls produced by plaintiff-counter-defendant, Dollcraft Co., or by Hallmark Cards, Exhibit 56.

23.

The names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," as used by defendant-counter-claimant on its dolls, do not point out the manufacturer of said dolls.

24.

The names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story" are descriptive and do not point to the origin or owner-

ship nor indicate in the slightest degree the person, natural or artificial, who manufactured such dolls or brought them to market.

25.

The names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story" were adopted by and applied to dolls by defendant-counter-claimant because the dolls to which they were applied in appearance simulated a well-known storybook character.

26.

Defendant-counter-claimant has failed to show that the primary significance of the names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," in the minds of the consuming public, is not the character represented by the dolls bearing said names, but is the defendant-counter-claimant, the producer of said dolls.

27.

The "June Girl" doll produced by defendant-counter-claimant shows itself to be a conceptual representation of a girl dressed for the month of June, it not being dressed in a bridal costume, but rather it is clothed in light, summery dress appropriate to an embodiment of the name itself, and the name denotes the doll, not the manufacturer, and is a descriptive name.

28.

Even if the name "June Girl" was a valid trade-mark, there is insufficient evidence to establish that the name "June Bride" constitutes either an infringement of the trade-mark "June Girl" or an unfair use of the word "June."

29.

Plaintiff-counter-defendant, Dollcraft Co., first packaged its dolls in individual cardboard boxes which had a red top and white bottom. Later it began using and now uses a box with a white bottom and a transparent, acetate top and also, for one series of its dolls, uses individual glass bottle containers.

30.

Plaintiff-counter-defendant, Dollcraft Co., beginning in 1946 or 1947, applied to the red-topped boxes containing its dolls, a gummed label or seal on which the following words appeared: "Globe Trotters, Doll-Craft Co., San Francisco, California." Later the boxes were rubber-stamped with the words, "Dollcraft Company, Santa Clara, California." The lids of the glass containers have, since they were first used in 1949, contained the words, "Dolls With a Story by Dollcraft, Santa Clara, California."

31.

Defendant-counter-claimant packages its dolls in individual white cardboard boxes printed on which, in multiple diagonal lines, are the words, "Nancy Ann Storybook Dolls," between which lines are ad-

ditional parallel lines of large polka dots with both the words and the polka dots printed in a single color.

32.

The packages in which plaintiff-counter-defendant, Dollcraft Co., sells its dolls are clearly distinguishable from the packages in which defendant-counter-claimant sells its dolls.

33.

There is no likelihood of mistaking the packages of plaintiffs-counter-defendants for those of defendant-counter-claimant nor the origin of such packages.

34.

"Fairyland" means the land or abode of fairies, who are imaginary supernatural beings.

35.

Defendant-counter-claimant uses the word, "Fairyland," as the name for a series of dolls which, while they may portray fictional characters, are neither representations nor likenesses of fairies.

36.

The defendant-counter-claimant has failed to establish by any evidence that the names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," have become known to the public or to dealers as denoting a product of defendant-counter-claimant.

37.

The evidence is insufficient to establish that the names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," have acquired a secondary meaning denoting defendant-counter-claimant as the source of the dolls to which they are applied.

38.

Both parties hereto are producing dolls of similar size and common conception. There is a natural resemblance between their products which may result in mistake as to origin or ownership. No fraudulent representations with respect to the origin of the products of plaintiff-counter-defendant have been made.

39.

That the evidence fails to show any likelihood of confusion in the ultimate customers between the products of plaintiff-counter-defendant, Dollcraft Co., and the products of defendant-counter-claimant, Nancy Ann Storybook Dolls, Inc.

40.

There is no evidence that there was any confusion in the trade between the products of defendant-counter-claimant and the plaintiffs-counter-defendants.

41.

There is no evidence that there was any likelihood of confusion in the trade between the products

of defendant-counter-claimant and the plaintiffs-counter-defendants.

42.

In October, 1949, two retail stores advertised plaintiff-counter-defendant, Dollcraft Co.'s, dolls, including "Red Riding Hood," "Little Bo-Peep," and "Sugar and Spice" under the names of "Story Dolls" and "Story Book Dolls." Immediately thereafter, defendant-counter-claimant served notices of alleged trade-mark infringement upon plaintiff-counter-defendant, Dollcraft Co., and certain customers of said plaintiff-counter-defendant, including the two stores which had so advertised, demanding that plaintiff-counter-defendant, Dollcraft Co., and its customers cease their trade-mark infringement and unfair competition and account for all profits derived from such practices.

43.

There is no evidence in the record that plaintiffs-counter-defendants practiced any fraud against defendant-counter-claimant in the manufacture and sale of its doll products.

44.

There is no evidence in the record that plaintiff-counter-defendant, Dollcraft Co., has represented by marks, signs, labels, colors, packages or in any other way that its dolls are manufactured by defendant-counter-claimant; on the contrary, the evidence shows that plaintiff-counter-defendant, Dollcraft Co., identifies its products by its own name clearly and unmistakably.

45.

The evidence establishes that as between the products of plaintiff-counter-defendant, Dollcraft Co., and defendant-counter-claimant that the dissimilarities outweigh the similarities, and plaintiff-counter-defendant, Dollcraft Co., has not unfairly competed with defendant-counter-claimant and has the right to use the descriptive names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story."

46.

That the evidence establishes that the plaintiff-counter-defendant, Dollcraft Co., did not unfairly compete with defendant-counter-claimant.

47.

That the evidence establishes that plaintiff-counter-defendant, Lester F. Hinz, did not unfairly compete with defendant-counter-claimant.

48.

That the evidence establishes that the plaintiff-counter-defendant, Robert E. Kerr, did not unfairly compete with defendant-counter-claimant.

49.

That the evidence establishes that plaintiff-counter-defendant, Lester F. Hinz, did not infringe valid trade-mark rights of defendant-counter-claimant.

50.

That the evidence establishes that plaintiff-counter-defendant, Robert E. Kerr, did not infringe valid trade-mark rights of defendant-counter-claimant.

51.

That the evidence fails to establish that plaintiff-counter-defendant, Dollcraft Co., is the alter ego of plaintiffs-counter-defendants, Lester F. Hinz and Robert E. Kerr.

Conclusions of Law

1.

That prior to the filing of the complaint herein there existed between plaintiff-counter-defendant, Dollcraft Co., and defendant-counter-claimant a substantial actual and judiciable controversy regarding the validity of trade-mark registrations "Sugar and Spice," "Fairylad," "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," in suit herein, and the questionability of infringement acts of plaintiff-counter-defendant, Dollcraft Co.

2.

This Court has jurisdiction of the cause of action set out in the complaint and the cause of action set out in the counter-claim herein and that the same are founded upon the trade-mark laws of the United States, and jurisdiction is also conferred by Title

28, U. S. Judicial Code, Section 2201 (the Federal Declaratory Judgment Statute).

3.

This Court has jurisdiction of the parties.

4.

The purpose of a trade-mark is to distinguish the goods of one person from those of another, and its primary and proper function is to identify the origin or ownership of the article to which it is affixed.

5.

The function of a trade-mark is to facilitate the identification of the maker or the seller of the merchandise, and one of the indispensable basic requirements of a trade-mark is that it distinctly point out the maker of the article to which it is attached. The trade-marks "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," fail to do this, and therefore do not function as trade-marks.

6.

A trade-mark must be of such a nature as to permit of an exclusive appropriation by one person, for unless the trade-mark performs its proper function, neither can the first adopter of it be injured by any appropriation or imitation of it by others, nor can the public be deceived.

7.

To acquire the right to the exclusive use of a

name, device or symbol as a trade-mark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached. The defendant-counter-claimant failed to establish that the trade-marks "Story-book," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," were adopted for this purpose.

8.

While the registration of a name or term as a trade-mark raises a presumption of its legality, the mere registration does not establish that name or term as a valid trade-mark, for such presumption is rebuttable.

9.

The mere registration of the names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," does not establish these names as valid trade-marks, for the presumption of validity is rebuttable and registrations such as those here in question are not valid when the term registered as a trade-mark is used merely as descriptive of the product, its qualities or characteristics, for such a mark does not advise the public that the article to which it is attached comes from a single source, and if it does so advise the public, if it is descriptive, the protection of the word as a valid trade-mark would be an infringement upon common speech, which would be legally improper.

10.

The names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," as applied to the dolls here in question, are incapable of performing the function of a trade-mark and are not susceptible of exclusive appropriation by one party, for they are names, which, from the very nature of the fact they are used to signify, may be employed by others with equal truth and with equal right for the same purpose.

11.

Every manufacturer of dolls is entitled to make and sell his conception of storybook characters familiar to all from childhood, and also has the right to employ the character name which aptly describes said doll.

12.

"Story" and "Storybook" properly serve as generic names for all that class of dolls which portray or represent fictional characters as does the name "Dolls With a Story."

13.

The names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," are invalid as trade-marks, because they are descriptive of the dolls to which they are applied.

14.

The names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," being purely generic and descriptive of the products to which they are applied, no secondary meaning can attach thereto so as to give anyone the exclusive right to the use thereof.

15.

The names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," as used by the defendant-counter-claimant, have not acquired a secondary meaning.

16.

The trade-mark registrations "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story," are invalid.

17.

The trade-mark registrations "Sugar and Spice" and "Fairyland" are valid.

18.

Even if the name "June Girl" was a valid trade-mark, the use of "June Bride" by plaintiff-counter-defendant, Dollcraft Co., is not an infringement of registration No. 403,261, for "June Girl."

19.

The plaintiffs-counter-defendants have practiced no fraud against defendant-counter-claimant.

20.

That plaintiffs-counter-defendants have committed no acts of unfair competition against defendant-counter-claimant.

21.

The defendant-counter-claimant has not unfairly competed with plaintiffs-counter-defendants.

22.

The plaintiff-counter-defendant, Dollcraft Co., is not the alter ego of plaintiffs-counter-defendants, Lester F. Hinz or Robert E. Kerr.

23.

That no damages were proved by any of the parties hereto as against the other parties.

24.

Plaintiffs-counter-defendants are entitled to their costs and disbursements herein.

25.

That plaintiff-counter-defendant, Dollcraft Co., is entitled to cancellation of the following trade-mark registrations pursuant to provisions of 15 U.S.C.A. Sec. 1119:

No. 389,114—"Storybook"

395,451—"Goldilocks"

395,454—"Little Bo-Peep"

403,261—"June Girl"
404,576—"Mistress Mary"
404,581—"Curly Locks"
404,586—"Little Miss Donnett"
420,077—"Red Riding Hood"
432,208—"Little Miss Muffett"
525,896—"Story."

26.

That defendant-counter-claimant is entitled to an injunction perpetually restraining plaintiffs-counter-defendants from infringing the names "Sugar and Spice" and "Fairylend."

27.

That plaintiffs-counter-defendants are entitled to an injunction perpetually restraining defendant-counter-claimant from in any manner interfering with plaintiffs-counter-defendants' use of the names "Storybook," "Goldilocks," "Little Bo-Peep," "June Girl," "Mistress Mary," "Curly Locks," "Little Miss Donnett," "Red Riding Hood," "Little Miss Muffett," and "Story."

Dated:

/s/ MICHAEL J. ROCHE,

Chief United States District
Judge.

Lodged December 12, 1950.

[Endorsed]: Filed December 19, 1950.

In the United States District Court, Northern
District of California, Southern Division

Civil Action No. 29270—G

DOLLCRAFT CO., a Corporation; LESTER F.
HINZ, ROBERT E. KERR,

Plaintiffs-Counter-Defendants,

vs.

NANCY ANN STORYBOOK DOLLS, INC., a
Corporation,

Defendant-Counter-Claimant.

JUDGMENT

This cause having come on to be heard upon the issues raised by the Complaint, Answer to Complaint and Counter-claim, and Answer to Counter-claim, and the Court having filed its Findings of Fact and Conclusions of Law, It Is Ordered, Adjudged and Decreed:

I.

That plaintiff-counter-defendant, Dollcraft Co., is a corporation duly organized and existing under and by virtue of the laws of the State of California and has a place of business at Santa Clara, County of Santa Clara, State of California.

II.

That plaintiff-counter-defendant, Lester F. Hinz, an individual, is a resident of the County of Santa Clara, State of California.

III.

That plaintiff-counter-defendant, Robert E. Kerr, an individual, is a resident of the County of San Mateo, State of California.

IV.

That defendant - counter - claimant, Nancy Ann Storybook Dolls, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has a place of business in the City and County of San Francisco, State of California.

V.

That this Court has jurisdiction of this cause and the parties.

VI.

That defendant-counter-claimant is the owner of the legal title to the following United States trademark registrations:

- “Red Riding Hood” Registration No. 420,007
March 26, 1946
- “Little Miss Muffett” . . . Registration No. 432,208
August 26, 1947
- “Little Bo-Peep” Registration No. 395,454
May 26, 1942
- “Mistress Mary” Registration No. 404,576
December 7, 1943
- “Little Miss Donnett” . . . Registration No. 404,586
December 7, 1943
- “Curly Locks” Registration No. 404,581
December 7, 1943

“Goldilocks”	Registration No. 395,451
	May 26, 1942
“June Girl”	Registration No. 403,261
	September 14, 1943
“Storybook”	Registration No. 389,114
	July 22, 1941
“Story”	Registration No. 525,896
	June 6, 1950
“Fairyland”	Registration No. 438,495
	April 27, 1948
“Sugar and Spice”	Registration No. 403,240
	September 14, 1943

VII.

That trade-mark registrations No. 420,007, dated March 26, 1946; No. 432,208, dated August 26, 1947; No. 395,454, dated May 26, 1942; No. 404,576, dated December 7, 1943; No. 404,586, dated December 7, 1943; No. 404,581, dated December 7, 1943; No. 395,451, dated May 26, 1942; No. 403,261, dated September 14, 1943; No. 389,114, dated July 22, 1941, and No. 525,896, dated June 6, 1950, are invalid and void in law and the registrations thereof are hereby cancelled.

VIII.

That trade-mark registrations No. 403,240, dated September 14, 1943, and No. 438,495, dated April 27, 1948, are valid.

IX.

That defendant-counter-claimant has no trade-mark rights in the words “Red Riding Hood,”

“Little Miss Muffett,” “Little Bo-Peep,” “Mistress Mary,” “Little Miss Donnett,” “Curly Locks,” “Goldilocks,” “June Girl,” “Storybook,” and “Story.”

X.

That the use of the words “Red Riding Hood,” “Little Miss Muffett,” “Little Bo-Peep,” “Mistress Mary,” “Little Miss Donnett,” “Curly Locks,” “Goldilocks,” “June Girl,” “Storybook,” and “Story,” by plaintiffs-counter-defendants has not infringed any trade-mark rights of defendant-counter-claimant.

XI.

That the plaintiffs-counter-defendants have not unfairly competed with the defendant-counter-claimant.

XII.

That the defendant-counter-claimant has not unfairly competed with plaintiffs-counter-defendants.

XIII.

That no damages are awarded plaintiffs-counter-defendants as against the defendant-counter-claimant.

XIV.

That no damages are awarded defendant-counter-claimant as against plaintiffs-counter-defendants.

XV.

That a Writ of Injunction issue out of and under the seal of this Court, enjoining and restricting the defendant - counter - claimant, its associates, attor-

neys, employees, servants, agents, stockholders and all those in privity with it or them, from in any manner asserting any trade-mark rights in any of the words "Red Riding Hood," "Little Miss Muffett," "Little Bo-Peep," "Mistress Mary," "Little Miss Donnett," "Curly Locks," "Goldilocks," "June Girl," "Storybook," and "Story," and in any manner interfering with the use of said words or any of them by plaintiffs-counter-defendants or their customers or prospective customers.

XVI.

That a Writ of Injunction issue out of and under the seal of this Court, enjoining the plaintiffs-counter-defendants, their associates, attorneys, employees, servants, agents and all those persons in privity with them from in any manner infringing the trade-mark rights of defendant-counter-claimant in its trade-marks "Sugar and Spice," No. 403,240, dated September 14, 1943, and "Fairyland," No. 438,495, dated April 27, 1948.

XVII.

That plaintiffs-counter-defendants recover from defendant-counter-claimant their costs and disbursements in this suit in the sum of of Two Hundred Fourteen and 50/100 Dollars (\$214.50) and have execution thereof.

Dated:

/s/ MICHAEL J. ROCHE,

Chief United States District
Judge.

Approved as to Form, Pursuant to Rule 5(e).

.....,
Attorney for Defendant-
Counter-Claimant.

Lodged December 12, 1950.

[Endorsed]: Filed December 19, 1950.

Entered December 20, 1950.

[Title of District Court and Cause.]

MOTIONS BY DEFENDANT - COUNTER-
CLAIMANT FOR: (A) NEW TRIAL OR
REHEARING, (B) TO AMEND FIND-
INGS, (C) TO AMEND JUDGMENT

Defendant-counter-complainant above named hereby
moves:

(A) For a New Trial of the Above-Entitled Ac-
tion; or, Alternatively, for a Rehearing of Said
Action.

The grounds for said motion are:

(1) The decision and judgment of the court is
contrary to the evidence.

(2) The decision and judgment of the court is
not supported by the evidence.

(3) The decision and judgment of the court does
not determine material issues raised by the plead-
ings and argued before the court, including the

issue of unfair competition pleaded and proved by defendant-counter-complainant.

In support of said motion defendant-counter-complainant alleges that the decision and judgment of the court is contrary to the evidence in that the evidence clearly shows that the marks

“Storybook”	.....No. 389114
“Goldilocks”	.....No. 395451
“Little Bo Peep”	.....No. 395454
“June Girl”	.....No. 403261
“Mistress Mary”	.....No. 404576
“Curly Locks”	.....No. 404576
“Little Miss Donnett”	.....No. 404586
“Red Riding Hood”	.....No. 420077
“Little Miss Muffett”	.....No. 432208
“Story”	.....No. 525896

and each of them have for many years been known and accepted by the trade as marks identifying the products upon which they are applied as products of the defendant-counter-complainant and its predecessors; and that said marks and each of them have acquired a secondary meaning, separate and distinct from the ordinary significance of the several terms, identifying the products to which they are variously applied as the products of defendant-counter-complainant and its predecessors. No evidence to the contrary is included in the record of the action.

(B) To Amend the Findings of Fact and Conclusions of Law as Follows:

(1) Section 11, change “since 1949” to—since

July 6, 1938—to conform to the evidence and the facts of the case.

(2) Strike out sections 18, 19, 20, 22, 23 and 24, and each of them because each is contrary to the evidence and the facts of the case.

(3) Strike out the last two lines of section 25, which read as follows: “because the dolls to which they were applied in appearance simulated a well-known storybook character.”

(4) Strike out the last line which reads “not the manufacturer, and is a descriptive name.”

(5) Strike out sections 28, 36 and 37 and each of them because each is contrary to the evidence and the facts of the case.

(6) Strike out the last sentence of section 38, reading: “No fraudulent representations with respect the origin of the products of plaintiff-counter-complainant have been made.”

(7) Strike out sections 39, 40, 43-51, inclusive, and each of them because each is contrary to the evidence and the facts of the case.

(8) Strike out the last sentence of section 5 of the conclusions of law, reading: “The trade-marks ‘Storybook,’ ‘Goldilocks,’ ‘Little Bo-Peep,’ ‘June Girl,’ ‘Mistress Mary,’ ‘Curly Locks,’ ‘Little Miss Donnett,’ ‘Red Riding Hood,’ ‘Little Miss Muffett,’ and ‘Story,’ fail to do this and therefore, do not function as trade-marks.”

(9) In section 7 of the conclusions of law, line

5, change "failed to establish" to—has proved——.

(10) Strike out sections 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, and 27, of the conclusions of law and each of them because they are not in conformity with the facts of the case and because it is neither necessary or proper in this case to so find.

(C) To Amend the Judgment as Follows:

(1) Section VII, next to last line, change "invalid" to—valid—; and strike out "are void in law and the registrations thereof are hereby cancelled."

(2) Strike out Sections IX, X, XI, XII, XV and XVII.

(3) Section XVI, last line, add, "Red Riding Hood," No. 420,007, March 26, 1946; "Little Miss Muffett," No. 432,208, August 26, 1947; "Little Bo-Peep," No. 395,454, May 26, 1942; "Mistress Mary," No. 404,576, December 7, 1943; "Little Miss Donnett," No. 404,586, December 7, 1943; "Curly Locks," No. 404,581, December 7, 1943; "Goldilocks," No. 395,451, May 26, 1942; "June Girl," No. 403,261, September 14, 1943; "Storybook," No. 389,114, July 22, 1941, and "Story," No. 525,896, June 6, 1950.

In support of said motions, defendant-counter-claimant will rely upon all of the pleadings and evidence included in the record of the case, and

upon the points and authorities set forth in the accompanying memorandum.

December 30, 1950.

NANCY ANN STORYBOOK
DOLLS, INC.

By /s/ HUGH N. ORR,
WM. G. McKAY,
Its Attorneys.

[Endorsed]: Filed December 30, 1950.

[Title of District Court and Cause.]

ORDER

It Is Hereby Ordered that defendant-counter-claimants' Motion for New Trial or Rehearing be denied.

It Is Further Ordered that Finding 11 be amended by deleting the date "1949," and inserting therefor the date "July 6, 1938."

It Is Further Ordered that the additional portions of defendant-counter-claimants' Motion to Amend Findings and Judgment be denied.

/s/ MICHAEL J. ROCHE,
Chief Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed January 26, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Nancy Ann Storybook Dolls, Inc., a corporation, defendant-counter-complainant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the decision of the United States District Court for the Northern District of California, Southern Division, dated and filed November 30, 1950, as to all of the issues involved therein, save and except the ruling of said court that the trade-marks "Fairyl-land Dolls," Registration No. 438,495, April 27, 1948, and "Sugar and Spice," Registration No. 403,240, September 14, 1943, are trade-marks validly registered in the United States Patent Office; and from the order of said United States District Court made and entered January 29, 1951, denying the motions of said Nancy Ann Storybook Dolls, Inc., defendant-counter-complainant dated December 30, 1950, for (A) a new trial or rehearing, (B) to amend findings, and (C) to amend judgment.

Dated February 27, 1951.

/s/ HUGH N. ORR,

/s/ WM. G. MacKAY,

Attorneys for Defendant-
Counter-Claimant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 27, 1951.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents: That we, Nancy Ann Storybook Dolls, Inc., as Principal, and United States Fidelity and Guaranty Company, a corporation duly incorporated under the laws of the State of Maryland, of Baltimore, Maryland, having an office and usual place of business at 444 California Street, San Francisco, California, as Surety, are held and firmly bound unto Dollcraft Co., Lester F. Hinz and Robert E. Kerr, in the full and just sum of Two Hundred, Fifty Dollars (\$250.00) to be paid to the said Dollcraft Co., Lester F. Hinz and Robert E. Kerr, their heirs, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 28th day of February, 1951.

Whereas, lately in the District Court of the United States for the Northern District of California, Southern Division, in a suit pending in said Court between Dollcraft Co., a corporation; Lester F. Hinz; Robert E. Kerr; plaintiffs-counter-defendants, and Nancy Ann Storybook Dolls, Inc., a corporation, defendant-counter-claimant, a judgment was rendered against the said defendant-counter-claimant, and the said defendant-counter-claimant, Nancy Ann Storybook Dolls, Inc., a corporation, having filed in said Court a notice of appeal to

reverse the judgment in the aforesaid suit, and the order of said court denying the motions of said defendant-counter-claimant for (A) a new trial or rehearing, (B) to amend findings, and (C) to amend judgment, the said judgment having been entered on the 30th day of November, 1950; and said order denying said motions having been entered upon January 29, 1951;

Now the Condition of This Obligation Is Such, That if the said defendant-counter-claimant shall pay the costs if the appeal is dismissed or the judgment is affirmed or such costs as the Appellate Court may award if the judgment is modified, then this obligation to be void; otherwise to remain in full force and virtue.

Dated February 28, 1951.

NANCY ANN STORYBOOK
DOLLS, INC.,

By /s/ A. L. ROWLAND,
Secretary-Treasurer,
Principal.

UNITED STATES FIDELITY
AND GUARANTY CO.,

[Seal] By /s/ JOHN E. HILL,
Attorney-in-Fact.

Acknowledgment of Signature.

State of California,
City and County of San Francisco—ss.

On this 28th day of February, 1951, before me, Ed. R. Abbott, a Notary Public, in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared A. L. Rowland, known to me to be the secretary and treasurer of the Corporation described in and that executed the within instrument, and also known to me to be the person who executed the within instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal at my office in the City and County of San Francisco, State of California, the day and year in this certificate first above written.

[Seal] /s/ ED. R. ABBOTT,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires May 31, 1952.

State of California,
City and County of San Francisco—ss.

On February 28, 1951, before me, Dorothy A. Muhlig, a Notary Public in and for the City and County of San Francisco, personally appeared John E. Hill, known to me to be the person whose name is subscribed to the within instrument as the At-

torney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as principal and his own name as Attorney-in-fact.

[Seal] /s/ DOROTHY A. MUHLIG,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires November 30, 1954.

[Endorsed]: Filed February 28, 1951.

[Title of District Court and Cause.]

STIPULATION RE RECORD ON APPEAL

It is hereby stipulated that the time for filing appellants' record on appeal may and shall be extended thirty (30) days, to and including, April 29, 1951.

/s/ HUGH N. ORR,

/s/ WM. G. McKAY,

Attorneys for Defendant-
Counter-Claimant.

MELLIN, HANSCOM &
HURSH,

/s/ JACK E. HURSH,

Attorney for Appellee.

Dated March 29, 1950.

Approved:

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed March 30, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME

Good cause therefore appearing, it is hereby ordered that the time for filing appellants' record on appeal in the above cause, may and shall be extended to May 27, 1951.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

Dated April 30, 1951.

Receipt of copy acknowledged.

[Endorsed]: Filed May 4, 1951.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Defendant-appellant in the above-entitled action, pursuant to the Federal Rules of Civil Procedure, hereby designates that the entire record and proceedings in the cause, including all papers therein save and except the briefs and memoranda of points and authorities submitted in behalf of the parties in connection with preliminary motions and the trial of the action, but including the transcript of all depositions and evidence produced at the trial be included in the Record of Appeal.

Dated April 30, 1951.

/s/ HUGH N. ORR,

Attorney for Nancy Ann
Storybook Dolls, Inc.

Receipt of copy acknowledged.

[Endorsed]: Filed May 4, 1951.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 29270

DOLLCRAFT CO., a Corporation; LESTER E.
HINZ, ROBERT E. KERR,

Plaintiffs-Counter-Defendants,

vs.

NANCY ANN STORYBOOK DOLLS, INC., a
Corporation,

Defendant-Counter-Claimant.

REPORTER'S TRANSCRIPT

Monday, August 21, 1950

Before: Hon. Michael J. Roche,
Judge.

Appearances:

For the Plaintiffs and Counter-Defendants:

MELLIN, HANSCOM & HURSH, by
OSCAR A. MELLIN, ESQ., and
JACK E. HURSH, ESQ.

For the Defendant and Counter-Claimant:

HUGH N. ORR, ESQ., and
WILLIAM G. McKAY, ESQ.

The Clerk: The case of Dollcraft Company, a
corporation, against Nancy Ann Storybook Dolls,
Incorporated, a corporation.

Mr. Orr: Ready.

Mr. Mellin: Ready.

The Court: Briefly, gentlemen, what is the matter before us this morning?

Mr. Mellin: Do you wish the plaintiff to make an opening statement at this time?

The Court: Yes.

Mr. Mellin: This is a trade-mark case. At this time, your Honor, if I may, I will hand you plaintiff's trial brief.

There are two complicated legal trade-mark questions involved and we have prepared a brief with authorities on which we will rely at the trial on those questions of law, and it might be that some of those will be argued during the course of the trial, and this may shorten it.

Briefly, the legal issue involved is whether or not certain trade-mark registrations are valid. Plaintiff has brought this suit by way of declaratory relief to ask this Court to declare these trade-marks invalid and to declare their registrations invalid under the authorities.

Briefly, the parties are—the plaintiff is the Dollcraft Company of Santa Clara, which is a corporation of [2*] California, and the defendant and trade-mark owner, is the Nancy Ann Storybook Dolls, Inc., of San Francisco.

The trade-marks principally involved are the names of fairyland or nursery rhyme or story book characters such as Little Red Riding Hood, Little Bo-Peep, and so forth. For example, the infringe-

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

ment which the defendant has charged the plaintiffs is characterizing this doll dressed as Little Red Riding Hood as "Little Red Riding Hood." They registered these names some years ago, and the plaintiff was more or less the newcomer in the business. They started here, as the evidence will show, as a very small concern two or three years ago, and while at first they made dolls of the same characters, that is, Little Bo-Peep and Little Red Riding Hood, they started a series by calling them "Who Am I" and let the children or whoever the purchasers were guess their names from their natural character and depiction. Then they, as the evidence will show, commenced marking the containers with the doll's name, but also in addition with their own individual mark and the name of the producer. This went on for some time. It is a seasonal business, and just before the commencement of that season last year, before the Christmas season, the defendant circularized the plaintiff's customers with charges of infringement of their trade-mark registrations of these dolls. So we charged in the complaint that that is unfair competition and had the effect of destroying the plaintiff's business, or at least [3] appreciably. So this suit was promptly brought by the plaintiff asking this Court for relief.

We will show the Court that although these trade-marks were registered some years ago, that in their attempt to monopolize all of the names of the fairyland, nursery rhyme and storybook characters, there was some quasi litigation, we might

call it, in the Patent Office regarding the registration of similar names in recent years; and the Patent Office has now taken the stand, and so has the United States Court of Customs and Patent Appeals, that names such as these cannot be exclusively appropriated by anyone and although the Patent Office does not try to cancel the registrations, it will not accept the application of some other person.

This defendant was well aware for quite a considerable period prior to their attempt to frighten away competition that it was very probable that all the trade-mark registrations were invalid under that ruling by the Commissioner of Patents. So we say that it was done not with an intent to protect their legitimate rights but in an attempt to monopolize and use something which they had notice was not, as the Court of Customs and Patent Appeals recently held, a thing in which they had an exclusive proprietary interest.

To put the issues right before the Court, we will show, first, that these trade-marks are public property; that the courts have ruled that trade-marks such as these belong to the [4] public in general and cannot be exclusively appropriated by anyone. We will secondly show they are not used by the plaintiff or defendant in a trade-mark sense, that is, in the sense in which a trade-mark is supposed to designate the goods and the origin of the goods, rather than some characteristic or some quality or other descriptive or generic term of the goods.

So we say, first, they were not used in a trade-

mark sense as required by law; that is as the law books at a trade-mark; and secondly, that they are of such type that they cannot be exclusively appropriated by anyone. So, therefore, the registrations of the trade-marks are invalid and should be so declared by this Court.

Mr. Orr: I would like to say just a few words in reply. I have never been connected with a case in which there were fewer facts in dispute, in which the issues are more simple and more sharply defined or in which the equities are so clear.

I think, as a matter of background, it would be worthwhile to discuss briefly the history of the development of this particular industry. It started back in the middle '30s as the hobby of Miss Nancy Ann Abbott. She, as a hobby, began dressing dolls, and as she would visualize some character taken from the nursery rhymes or Mother Goose story books or from the fairy tales, she would dress that doll to embody her visualization of the particular character. They were attractive little dolls, made quite a hit with many of her friends, so much [5] so that her friends, including Mr. Rowland, who has since become her active associate, induced her to take it up as a commercial enterprise. So beginning along about 1936 or 1937 a corporation was formed, at that time called Nancy Ann Dressed Dolls, Inc., and undertook the manufacture on a commercial scale of these little dolls. After due investigation they selected various trade-marks to identify them as a trade-marked product. Among those trade-marks are the same story book char-

acters which Mr. Mellin mentioned a moment ago, and which are the most popular ones that they have. In addition there were names selected to identify series of dolls. There was a Mother Goose series, there was a Doll of the Month series, there was a Doll of the Day series, and various other series which covered a considerable number of dolls within a particular group. Within those groups there were lesser designations of various dolls. They were identified by their individual trade-mark, and those trade-marks have been used on dolls that have been extensively sold throughout the United States in enormous quantities in the past fifteen years. Those marks have come to be accepted by the trade and by the public in general as designating a product originating from the Nancy Ann organization.

Through the years, from the first organization of Nancy Ann Dressed Dolls, Inc., the organization was transferred for business reasons to a partnership in which the name was reduced [6] to Nancy Ann Dressed Dolls. The equitable ownership of the organization was exactly the same as it had been in the corporation which preceded it. Still more recently, another transformation has been made in the set-up and it has again been incorporated and the new name is Nancy Ann Storybook Dolls, Inc. The equitable ownership in the organization is exactly the same as it was when it started out; the management control has been the same throughout; the financial interests have been the same throughout. Throughout that whole period all of the dolls have been personally designed by Miss Abbott.

The business activities have been divided among the partners, to be carried primarily by Mr. Rowland who has acted as manager and the active business executive of the organization.

These dolls have been sold in very large quantities. From a very nominal production when it started, before the war, it had increased to a production of five thousand or more per day. During the war there was a period when materials were hard to get, difficult to get adequate supplies of this, that or the other, and some of the lines had to be temporarily discontinued. Throughout the war there was a very active production, and during most of the war there were produced five thousand or more per day. More recently, at the present time the production approached seven thousand dolls per day. There have been millions of these dolls sold throughout the United States and many of the foreign countries. [7]

Their policy throughout this whole enterprise has been to sell almost exclusively to the major department stores throughout the country—the Emporium, Marshall Field, Gimbel's—stores of that kind have bought in very great quantities and have popularized the dolls. Advertising has been comparatively small on the part of the Nancy Ann organization, but very extensive on the part of the users, that is, the outlets for these dolls. The department stores have advertised extensively through these years, and because of that advertising and because of the tremendous popularity of the dolls, they have claimed a special field of their own, a

field of very real quality, known as the Nancy Ann Storybook Dolls.

It started a vogue for collecting dolls. Little girls had never had a popular vogue as collectors. Little boys collected match covers or bottle caps or tops or marbles, but little girls did not have very much to collect. These little dolls designed to personify individual little characters that they had met in nursery rhymes and in story books appealed to them, and it set up a vogue for collecting the items, and that vogue extended not only to the little girls for whom they were originally created, but to the grown-up girls. Grown-up women made large collections of these dolls and it became a part of the plan of the organization to continue to add new items to these lines to supply the demand. That has constantly increased and it is still at high peak. [8]

As happens in a successful enterprise, there are a number of imitators. They have sprung up here, there and the other place.

Throughout this proceeding the Nancy Ann organization has made it their policy to select and apply to their dolls only those trade-marks which they could protect, and they did take appropriate action. They would make investigation and ascertain that a mark had not been in use or was not in use and they would seek protection in the Patent Office. In many cases registrations have been filed, and in all of the cases that are here involved in this case, registrations have been granted by the Patent Office to the Nancy Ann organization. Those

registrations are presently owned by the defendant in this action, who is also a counter-complainant.

Those registrations are entitled to a presumption of validity. They are issued by the Patent Office with that presumption. They also carry the presumption of ownership and use. Ownership and use we can very readily prove. The only issue then becomes as to their validity. As I say, those marks are issued with the presumption of validity. Added to that presumption there is the fact of continuous, extended use by the defendant ranging up to fifteen years.

In many cases oppositions arose in the Patent Office. In every case the Nancy Ann organization took all the appropriate action to defend and protect its rights. [9]

Some of these marks were registered only after opposition by others. For instance one of the marks "Little Miss Muffett" was opposed by an organization owning the registration of the word "Mary Muffett" used for little girls' clothes. That opposition was dismissed as being without merit and a registration of "Little Miss Muffett" was granted to the Nancy Ann organization.

In another case there was an interference involving the mark "Mother Goose." In that particular case the parties had made application for the registration of the mark "Mother Goose" for dolls. In the course of that interference it was determined that priority belonged to the Nancy Ann organization and the mark was registered.

Incidentally, in the course of that proceeding the other party, a party down in the southern part of the State named Ippolito, had purchased from a previous owner an old registration of the mark "Mother Goose" that had expired. The mark had become abandoned, had not been in use for a number of years at the time it was purchased by the Ippolito organization, and the Court of Patent Appeals held that all he purchased was the bare paper registration with no good will or no business, and that the mark had become abandoned and available for appropriation by the Nancy Ann organization, who did adopt it and has used it under the new registration.

Further instances of that kind occurred all the way down [10] the line.

Long after the war in 1946, the Dollcraft Organization appeared on the scene. It began in a very small way here out in the Richmond District and made in the apartment of two individuals, Mr. and Mrs. Juster. Those dolls were originally designated by marks including the names of little girls popularly used so that a little girl named Mary seeing the Mary doll in the store would be urged to buy the Mary doll, while Dorothy would want the Dorothy doll and Helen the Helen doll. That practice was continued and I think is still in force.

Later they added an additional line, a line of foreign dolls, as they were called, dolls dressed in the costumes of various countries—Scotland, Ireland, Austria, Spain, or where have you. Those

were sold with designations identifying their source, and in no case was it a mark which approached any of the trade-marks that have been appropriated and used by the Nancy Ann organization. A little later there was a series came out entitled the "Who Am I" series that was designated "Who Am I blank?" and there was no name applied to the price list, to the circulars or to the doll, merely "Who Am I?" and it was left to the little purchasers to make their own guess as to who that doll might be. That occurred while the organization was small, while it was conducted as a partnership by Mr. and Mrs. Juster and Mr. Mollison who was associated with them. [11]

Along in 1948 the Justers were endeavoring to make arrangements with Mr. Hinz and Mr. Kerr, who are also named as plaintiffs and co-cross-defendants in this action, to combine their interests and form a corporation which was known as Dollcraft Corporation.

Mr. Hinz is the owner of an organization called the Myers Ceramic Products Company located down near Santa Clara. In the early 1940's he was engaged by the Nancy Ann organization to make and sell to them the little bisque bodies which were used for decorating and dressing the dolls they were selling as Nancy Ann Storybook dolls. At the time Nancy Ann's organization had had difficulty in securing an adequate supply of little bisque bodies to meet the demands of their trade, and arrangements were made with Mr. Hinz to supply that demand. And for a matter of two or three years he did supply all the dolls that they needed

and Nancy Ann purchased all the doll bodies he could make.

Then, as sometimes happens, misunderstandings arose, and it was determined that the arrangement with Mr. Hinz should be discontinued and the Nancy Ann organization acquired a ceramic plant of their own in which they made the little bodies themselves. Mr. Hinz was a little disconcerted about that arrangement; a little incensed; thought that he had been treated badly. I think it will appear that he still carries a little resentment toward the Nancy Ann organization because of that [12] circumstance.

Joined with Mr. Hinz is a gentleman named Kerr. Mr. Kerr was an employee of the Nancy Ann organization. Mr. Kerr started with them as shipping clerk and occupied various positions with progressively increasing responsibility, until he had a pretty complete understanding and knowledge of the business and its activities and its values, and ultimately reached the point where he thought his responsibility and so forth should be still further increased beyond what the Nancy Ann organization could offer, and the relationship was terminated with Mr. Kerr leaving as a disgruntled employee.

During the formative years of the Nancy Ann organization there was a man named Patterson, who was their primary salesman, who sold the bulk of their dolls during the early years. The relationship was friendly for a number of years, and then it reached a point where there were differences of

opinion again, and in this case again there was a parting of the ways, with Mr. Patterson occupying the position of a disgruntled ex-agent or business agent or salesman.

Now somewhere in the picture—and I think the evidence will make it very clear—there developed a plan of action involving Mr. Patterson, Mr. Kerr and Mr. Hinz to avenge their wrongs at the hands of Nancy Ann, at the expense of Nancy Ann.

The Dollcraft Company originated, as I have said, by Mr. and Mrs. Juster, and it was conducted on a thoroughly [13] competitive basis for a number of years. They were induced to move their plant down into the same building that is occupied by the Myers Ceramic Company, which produces these doll bodies. Housed in that same building there is an organization known as Kerr & Hinz. That is a corporation that was organized for the purpose of decorating the dolls made by Myers Ceramic Company. They paint them, put on the eyes and the decorations, put the wigs on, place the doll bodies in condition to be dressed by the manufacturer. So Myers Ceramic Company, which is Mr. Hinz, makes and sells dolls to Kerr & Hinz, of which he is the primary and principal owner. They in turn decorate the doll bodies, and in turn sell them to Dollcraft, who in turn dress them and sell them, put them on the market.

The Dollcraft organization is listed by Dun & Bradstreet as of a value in the neighborhood of twenty or twenty-one thousand dollars. The Kerr

& Hinz organization is rated by Dun & Bradstreet in the neighborhood of something over a hundred thousand. The Myers Ceramic plant, which is the root of it, is rated at around \$850,000. The profits of the organization I imagine are apportioned in about that same ratio.

When this corporation was formed, the plant was moved down to the Myers Ceramic plant, and a change of policy immediately became apparent. Whereas previously the "Who Am I" series had had no name designated to identify the doll; there was no mark upon the doll, no mark upon the box, no mark upon [14] the price lists, no mark upon the little circulars that accompanied the doll to the customers, they adopted many of the marks that had been adopted and used by the Nancy Ann organization almost immediately afterwards. The records will show that pursuant to actions by the board of directors, which includes Mr. Hinz and Mr. Kerr, names were applied these dolls of the "Who Am I?" series, to designate Little Red Riding Hood, Little Miss Muffett, Little Bo-Peep, Curly Locks, Goldilocks, Sugar and Spice.

Everyone of those names had previously been adopted and used for years by the Nancy Ann organization and registrations of them had been granted by the Patent Office years before the Dollcraft organization came into being. That was the start. They carried on through the latter part of 1948 and into 1949, and in 1949 they came out with full force. They put out a new line of dolls which they identified among other things as the

dolls of the story line, not story book dolls, but dolls with a story.

Mr. Mellin: If your Honor please, there is no charge that we came out with story book dolls; that was the Macy ad. That is the ad you are referring to; that wasn't our ad.

Mr. Orr: I repeat, your Honor, the doll line that they put out they identified by the mark which they applied to the dolls themselves, and it appears on the cover of this bottle "Dolls With a Story." [15]

Mr. Mellin: I thought you said story book dolls.

Mr. Orr: I said not story book dolls, but dolls with a story. The suggestion is identical. They came out with a line in which there were eight in number in this particular group, I think, and they plainly marked on the bottle "Red Riding Hood," "Little Bo-Peep," "Sugar and Spice,"—the entire group very carefully and clearly and plainly marked with the trade-mark which had been used and registered by the Nancy Ann organization years before.

Those dolls in this bottle container were sold to the trade, we believe and the facts will show, with the intent and with the result, certainly, of inducing the misrepresentation, inducing the confusion which would result, and that confusion did result. Macy's right here in San Francisco came out with a quarter page ad announcing this new line not story book dolls but of story dolls, and listing in their ads many, many of these registered names which are owned by the Nancy Ann organization. They were sold not just at the department stores but to everybody that would stock a small number—drug stores,

a market out here handled meats, groceries, what-not, stocked them; liquor stores—any place where they could put a half dozen or a dozen of these dolls they were put.

This was brought to the attention of the Nancy Ann organization. Notices of infringement were promptly prepared and sent to the Dollcraft organization and to those users [16] whose use had come to our attention. Within I think it was a week or ten days after that notice was sent out, with no reply to that notice, we were served with a bill of complaint in this action seeking relief under the Declaratory Judgment Act to have it determined that all of those registrations issued by the United States Patent Office after due procedure, issued with all the presumptions attendant to issues of the United States Government, be declared invalid.

We submit, your Honor, that all the facts and circumstances of this situation point to a deliberate raid on the part of Messrs. Kerr & Hinz operating through and as Dollcraft organization, against the property rights, trade-marks and the good will of the Nancy Ann organization.

In this case most of the basic facts I think can be stipulated. There is no dispute as to the major facts. They admit that they made the dolls; they admit that they used the names; they admit the registrations have been granted by the United States Patent Office; if those marks are valid there is no argument against the matter of infringement.

Therefore the only issue would be as to validity. Added to that is the question of unfair competition. Nancy Ann feels that it has been very badly used and we have charged them with unfair competition.

We have not mentioned something. They have made a very extravagant statement in their bill of complaint charging [17] the procuring of these registrations by fraud or deceit—I don't know just the exact term, but involving fraud and deceit, of which I will be very anxious to see the proof.

So it boils down in a nutshell to who is competing unfairly with whom. We feel that the facts will show that there is no question that the victim of this unfair competition is the Nancy Ann organization, and when the proof is in we feel that the Court should grant the relief that we have prayed for in our cross-complaint.

Mr. Mellin: Proceed, your Honor?

The Court: Yes.

Mr. Mellin: Mr. Juster.

MAURICE JUSTER

called as a witness on behalf of the plaintiff, sworn:

The Clerk: Will you state your full name?

A. Maurice Juster.

Mr. Mellin: At this time, your Honor, I would like to offer a copy of the trade-mark registration 420,077, "Red Riding Hood," as plaintiff's Exhibit 1.

Mr. Orr: No objection.

The Court: It may be admitted and marked.

(Testimony of Maurice Juster.)

(Thereupon trade-mark registration No. 420,077 was marked plaintiff's Exhibit No. 1 and received in evidence.)

Mr. Mellin: I would like to offer a copy of trade-mark registration No. 432,208, "Little Miss Muffett," as plaintiff's [18] Exhibit No. 2.

The Court: Any objection?

Mr. Orr: No objection, your Honor. I will stipulate that all of these may be admitted without objection.

The Clerk: Plaintiff's Exhibit 2.

(Thereupon trade-mark registration 432,208 was marked plaintiff's Exhibit No. 2 and received in evidence.)

Mr. Mellin: I will offer trade-mark No. 395,454, "Little Bo-Peep," as plaintiff's Exhibit No. 3.

The Clerk: Plaintiff's Exhibit 3.

(Thereupon trade-mark registration No. 395,454 was received in evidence and marked plaintiff's Exhibit No. 3.)

Mr. Mellin: Copy of trade-mark registration 404,576, "Mistress Mary," as plaintiff's Exhibit No. 4.

The Clerk: Plaintiff's Exhibit 4.

(Thereupon trade-mark registration No. 404,576 was received in evidence and marked plaintiff's Exhibit No. 4.)

Mr. Mellin: I offer trade-mark registration No.

(Testimony of Maurice Juster.)

404,586, "Little Miss Donnett," as plaintiff's Exhibit No. 5.

The Clerk: Plaintiff's Exhibit 5.

(Thereupon trade-mark registration No. 404,586 was received in evidence and marked plaintiff's Exhibit No. 5.)

Mr. Mellin: I offer copy of trade-mark registration No. 404,581, "Curly Locks," as plaintiff's Exhibit No. 6.

(Thereupon trade-mark registration No. 404,581 was [19] received in evidence and marked plaintiff's Exhibit No. 6.)

Mr. Mellin: I offer copy of trade-mark registration No. 395,451, "Goldilocks," as plaintiff's Exhibit No. 7.

(Thereupon copy of trade-mark registration No. 395,451 was received in evidence and marked plaintiff's Exhibit No. 7.)

Mr. Mellin: I offer copy of trade-mark registration No. 403,240, "Sugar and Spice," as plaintiff's Exhibit No. 8.

(Thereupon copy of trade-mark registration No. 403,240 was received in evidence and marked plaintiff's Exhibit No. 8.)

Mr. Mellin: I offer trade-mark registration No. 389,114, "Storybook," as plaintiff's Exhibit No. 9.

(Testimony of Maurice Juster.)

(Thereupon trade-mark registration No. 389,114 was received in evidence and marked plaintiff's Exhibit No. 9.)

Mr. Mellin: I offer copy of trade-mark registration No. 438,495, "Fairyland," as plaintiff's Exhibit No. 10.

(Thereupon trade-mark registration No. 438,495 was received in evidence and marked plaintiff's Exhibit No. 10.)

Mr. Mellin: And trade-mark No. 403,261 as plaintiff's Exhibit No. 11.

Mr. Orr: What is the last one?

Mr. Mellin: "June Girl."

Mr. Orr: Just a moment. Mr. Mellin. I believe we discussed over the telephone the matter of stipulating that there be added to the record the registration of the word "Story." Would you like to offer that in evidence now? [20]

Mr. Mellin: Yes, sir; I will do that. I would like to offer that. it is registration No. 525,896. "Story"; I would like it to go in the record as 9-A, together with "Storybook."

The Court: So ordered.

(Thereupon trade-mark registration No. 525,896, "Story," was received in evidence and marked plaintiff's Exhibit No. 9-A.)

Mr. Mellin: At this time, your Honor. I would like to offer a certified copy of the proceedings in

Testimony of Maurice Juster.)

The Patent Office in connection with the registration of "Little Red Riding Hood" as plaintiff's Exhibit 12.

Mr. Orr: No objection.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 12 in evidence.

(Proceedings of Patent Office referred to were received in evidence and marked plaintiff's Exhibit No. 12.)

Mr. Mellin: I should also like to offer in evidence a certified copy of the file wrapper of the proceedings connected with the registration of "Little Bo-Peep" as plaintiff's Exhibit No. 13.

Mr. Orr: No objection.

The Court: It may be admitted next in order.

The Clerk: 13.

(Thereupon certified copy of file wrapper referred to above was received in evidence and marked plaintiff's Exhibit No. 13.) [11]

Mr. Mellin: And a certified copy of the file wrapper in connection with the "Storybook" registration as plaintiff's Exhibit 14.

Mr. Orr: No objection.

The Clerk: Plaintiff's Exhibit No. 14.

(Thereupon certified copy of file wrapper referred to above was received in evidence and marked plaintiff's Exhibit No. 14.)

(Testimony of Maurice Juster.)

(Thereupon trade-mark registration No. 389,114 was received in evidence and marked plaintiff's Exhibit No. 9.)

Mr. Mellin: I offer copy of trade-mark registration No. 438,495, "Fairylend," as plaintiff's Exhibit No. 10.

(Thereupon trade-mark registration No. 438,495 was received in evidence and marked plaintiff's Exhibit No. 10.)

Mr. Mellin: And trade-mark No. 403,261 as plaintiff's Exhibit No. 11.

Mr. Orr: What is the last one?

Mr. Mellin: "June Girl."

Mr. Orr: Just a moment, Mr. Mellin. I believe we discussed over the telephone the matter of stipulating that there be added to the record the registration of the word "Story." Would you like to offer that in evidence now? [20]

Mr. Mellin: Yes, sir; I will do that. I would like to offer that, it is registration No. 525,896, "Story"; I would like it to go in the record as 9-A, together with "Storybook."

The Court: So ordered.

(Thereupon trade-mark registration No. 525,896, "Story," was received in evidence and marked plaintiff's Exhibit No. 9-A.)

Mr. Mellin: At this time, your Honor, I would like to offer a certified copy of the proceedings in

(Testimony of Maurice Juster.)

the Patent Office in connection with the registration of "Little Red Riding Hood" as plaintiff's Exhibit 12.

Mr. Orr: No objection.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 12 in evidence.

(Proceedings of Patent Office referred to were received in evidence and marked plaintiff's Exhibit No. 12.)

Mr. Mellin: I should also like to offer in evidence a certified copy of the file wrapper of the proceedings connected with the registration of "Little Bo-Peep" as plaintiff's Exhibit No. 13.

Mr. Orr: No objection.

The Court: It may be admitted next in order.

The Clerk: 13.

(Thereupon certified copy of file wrapper referred to above was received in evidence and marked plaintiff's Exhibit No. 13.) [21]

Mr. Mellin: And a certified copy of the file wrapper in connection with the "Storybook" registration as plaintiff's Exhibit 14.

Mr. Orr: No objection.

The Clerk: Plaintiff's Exhibit No. 14.

(Thereupon certified copy of file wrapper referred to above was received in evidence and marked plaintiff's Exhibit No. 14.)

(Testimony of Maurice Juster.)

Direct Examination

By Mr. Mellin:

Q. Will you give us your full name, your age and residence, Mr. Juster?

A. Maurice Juster, age 42, 3472 Fresno Street, Santa Clara.

Q. What is your occupation, Mr. Juster?

A. Manager of a doll factory.

Q. And that is the——

A. Dollcraft Company.

Q. The plaintiff in this action? A. Yes.

Q. Are you an officer of that company?

A. Yes, I am.

Q. And what office do you hold?

A. Secretary-treasurer.

Q. Are you also a stockholder in Dollcraft?

A. Yes, I am.

Q. Do you, in your capacity, as secretary-treasurer, do you [22] know the outstanding shares of that corporation and by whom they are owned?

A. Yes, sir.

Q. Would you tell us, please, who are the shareholders and what number of shares they own?

A. My wife, my brother-in-law and myself; we each have ten shares.

Q. That is ten shares to Elise Juster, ten shares to yourself, and ten shares to Richard Mollison?

A. Richard Mollison, yes.

Q. Who are the other stockholders?

A. Mr. Hinz.

(Testimony of Maurice Juster.)

Q. How many shares does he own?

A. Thirty-two shares.

Q. And Mr. Kerr?

A. Twenty-eight shares.

Q. And that is all the outstanding stock and all the stockholders?

A. That is all.

Q. Who are the other officers?

A. Mr. Hinz is president.

Q. Is that the only other officer?

A. Just a few officers.

Q. Will you tell us, is that a corporation of California, Mr. Juster? [23]

A. Yes, it is.

Q. And when was it incorporated, approximately, if you know?

A. It was approximately April, 1948.

Q. And what is the present location of the Dollcraft Company?

A. It is in Santa Clara county in the Myers Ceramic Building.

Q. In Santa Clara?

A. In Santa Clara.

Q. That is California?

A. California.

Q. And did that corporation, to your knowledge, succeed a partnership?

A. Yes, it did.

Q. And who were the partners? What was the name of that partnership?

A. Well, my wife and I.

Q. What was the name of the partnership?

A. Dollcraft Company.

Q. And who were the partners?

A. My wife, my brother-in-law and myself.

(Testimony of Maurice Juster.)

Q. And what was the business of that partnership?

A. That was to dress, to package and sell dolls—miniature dolls.

Q. By the way, is Mrs. Juster in Court?

A. No, sir. [24]

Q. And that is because she has had a major operation and has just returned from the hospital; that is why she couldn't accept a subpoena, is that right?

A. That's right.

Q. What was your business, let us say prior to going in the Navy?

A. I was in the men's wear business for about 16 years.

Q. What was Mrs. Juster's occupation or avocation or profession?

A. She was a designer—dress designer.

Q. How did this doll business originate, if you would tell us briefly and when?

A. I was overseas when my wife wrote me a letter telling me that she was doing research on foreign costumes for miniature dolls. At that time I thought it was a good idea for her to be doing something, keeping herself occupied; it was in her line of endeavor; and when I came back, why, she had had all these sketches and names and so forth, and shortly after I got out, why, we went into business in a very small way.

The Court: Fix the time.

Q. (By Mr. Mellin): When was that, Mr. Juster?

(Testimony of Maurice Juster.)

A. Well, we started active production in, I believe, September of 1946.

Q. When did you get out of the navy?

A. The end of '45—December, '45.

Q. And where did you make these dolls that you made in [25] commercial production in '47?

A. In our apartment, 712 21st Avenue, San Francisco.

Q. And did you adopt a name for that business at that time?

A. It was the Dollcraft Company.

Q. At that time were you acquainted with Mr. Hinz or Mr. Kerr?

A. Never had met the gentlemen.

Q. What dolls did you commence commercializing in that partnership, Mr. Juster?

A. Well, the materials to start production on the foreign dolls just weren't available so shortly after the war, so my wife designed a group of dolls, numbers with very short dresses and mainly out of felt and we marketed those first twelve in September of '46.

Q. What sort of dolls were they? Did they represent or depict anything?

A. No, they were just small miniature dolls with little girls' names.

Q. How long did you continue to commercialize those?

A. Well, we sold that series all through '47, and also the foreign dolls, and we brought out on re-

(Testimony of Maurice Juster.)

quest of a big store back east the Hansel and Gretel doll.

Q. When was it that you brought out the Hansel and Gretel doll?

A. Oh, that was the latter part of '47. [26]

Q. What other series or types of dolls did you make? A. You mean after '47?

Q. Yes. Well, in '47, as I understand it, you made that little girls' names series?

A. That's right.

Q. And the foreign series and Hansel and Gretel? A. Hansel and Gretel.

Q. Any others? A. That is all in 1947.

Q. In '48 what dolls did you make during that year?

A. Then, we were moving a little faster, then, and we supplemented our line with a nun.

Q. What? A. A nun doll.

Q. Yes.

A. And elaborated on the Little Lady Series, and we added the "Who Am I" series—a series of little character dolls from, oh, fairyland tales.

Q. Who designed all of those dolls, if you know, Mr. Juster?

A. My wife designed every number that we have ever sold.

Q. And the "Who Am I" dolls, were they dolls as I understand it, that depicted characters in fairy tales, story books, nursery rhymes and Mother Goose? A. That is right.

(Testimony of Maurice Juster.)

Q. And can you tell us what characters those were? [27]

A. Let's see, offhand, there was "Red Riding Hood."

Q. Just a moment. "Red Riding Hood." I show you a doll and ask you if that is a doll that was made in 1948 and sold by you, and what doll that depicts?

A. This is our "Red Riding Hood" doll.

Q. Does it have any particular characteristics, either in dress, design or otherwise, that would illustrate Little Red Riding Hood, and if so, would you tell us which ones they are?

A. It has the red hood and the red cape.

Q. And is that commonly or not commonly associated in fairy tale illustrations with Little Red Riding Hood?

A. That is very true.

Q. And that doll was made by the partnership and sold by the partnership?

A. Yes, sir.

Q. Was that prior or subsequent to the time that you became acquainted with Mr. Hinz or Mr. Kerr?

A. That was prior.

Mr. Mellin: We offer that doll in evidence, your Honor, as plaintiff's Exhibit 15.

The Court: It will be admitted and marked.

The Clerk: Fifteen in evidence.

("Little Red Riding Hood" doll referred to above was received in evidence and marked Plaintiff's Exhibit No. 15.)

Q. (By Mr. Mellin): I show you another doll,

(Testimony of Maurice Juster.)

it is called [28] "Who Am I" and given a number, and ask you what that is, if you know?

A. That one is "Miss Muffett."

Q. And when did you produce that doll, if you can tell us?

A. That was in '48, beginning '48.

Q. Beginning '48. Was that before or after you met Mr. Kerr and Mr. Hinz?

A. Before we met them.

Q. How do you identify that as Miss Muffett?

A. Well, it is mainly the style of her dress and her little cap that she is wearing.

Q. In other words, are those or are they not the features, decorations or characteristics of the nursery rhyme or story books designating or illustrating Miss Muffett?

A. That is right; you generally get your ideas from illustrations from old books, or even current books, most of them.

Mr. Mellin: I will offer the doll just identified by the witness as "Little Miss Muffett" as plaintiff's exhibit next in order, 16.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 16 in evidence.

(Thereupon, "Little Miss Muffett" doll referred to above was received in evidence and marked Plaintiff's Exhibit No. 16.)

Q. (By Mr. Mellin): I show you another "Who Am I" doll and ask you if you can identify it? [29]

A. That is "Little Bo-Peep."

(Testimony of Maurice Juster.)

Q. And why do you say that? It is not so marked on the box.

A. Well, her panniers and her crook in her hand.

Q. What are panniers?

A. They are the fancy flounces on the sides of the dress, and the crook in her hand.

Q. That is the crook or staff?

A. That is right.

Q. When was that doll produced by the Dollcraft Company, a partnership, if you will state, please?

A. Beginning '48.

Q. Was that before or subsequent to the time that you became a corporation and became acquainted with Mr. Hinz and Mr. Kerr?

A. Before.

Mr. Mellin: I will offer "Little Bo-Peep" in evidence as Plaintiff's Exhibit 17.

The Court: Let it be admitted and marked.

(Thereupon, doll "Little Bo-Peep" referred to above was received in evidence and marked Plaintiff's Exhibit No. 17.)

The Court: We will take a recess.

(Recess.)

Q. (By Mr. Mellin): I show you another doll and ask you if you can identify it?

A. That one is "Mistress Mary." [30]

Q. And does it have any characteristics usually associated with Mistress Mary?

(Testimony of Maurice Juster.)

A. Yes, her little flowered print dress and an apple in her hand.

Q. And when was that doll produced?

A. The beginning of '48.

Q. Was that part of the "Who Am I" series?

A. Yes, it is.

Mr. Mellin: I offer that doll in evidence as Plaintiff's Exhibit 18.

The Court: Let it be admitted and marked.

(Thereupon, "Mistress Mary" doll referred to above was received in evidence and marked Plaintiff's Exhibit No. 18.)

Q. (By Mr. Mellin): I hand you a doll that says "Who Am I, No. 205" and ask you if you know the identity of that doll?

A. That is "Alice in Wonderland."

Q. Why do you say that? When you say that, does that doll have any characteristics, dress or otherwise, that would identify it with the story book character?

A. Well, they generally in the story of Alice in Wonderland, she is wearing this type of apron, and she is blond and she wears a bow in her hair.

Mr. Mellin: I offer that as Plaintiff's Exhibit 19.

The Court: So ordered.

(Thereupon, "Alice in Wonderland" doll referred to above [31] was received in evidence and marked Plaintiff's Exhibit No. 19.)

(Testimony of Maurice Juster.)

Q. (By Mr. Mellin): By the way, were those dolls sold in boxes such as I have showed the dolls to you in? A. Yes.

Q. And did any descriptive matter accompany each box or not? A. Yes, they did.

Q. I show you a blue brochure that is called "Miniature Dolls Made by the Dollcraft Company, San Francisco, Cal.," and ask you to identify it?

A. Yes.

Q. How was it used?

A. This was used in each box we shipped.

Q. That is with each of the dolls that we have just identified? A. That's right.

Q. And one was put in each box?

A. Yes.

Mr. Mellin: May I offer that in evidence, your Honor?

The Court: It will be admitted and marked.

(Thereupon, brochure referred to above was received in evidence and marked Plaintiff's Exhibit No. 20.)

Q. (By Mr. Mellin): Were these folders prepared and these dolls that we have just identified, these eight dolls, prepared and commercially produced prior to the incorporation? [32]

A. Yes, they were.

Q. I understand you identified certain of them as being produced during the year '47, and certain of them the early part of the year '48; that is correct or incorrect? A. That is right.

(Testimony of Maurice Juster.)

Q. And these folders, which are Plaintiff's Exhibit 20, when were they produced?

A. Beginning '48. The moment we got them from the printers they were put into the boxes.

Q. I notice on this Exhibit 20 is the notation, "Fairyland Series"? A. That is right.

Q. When was that adopted as a series name or as a group name for your dolls?

A. Beginning 1948.

Q. At the beginning—would you say January or February?

A. Yes. When I took it down to the printers I thought that would be a good name to apply to the series.

Q. It says on here:

"I am a little friend of yours,

"Fairyland is where I dwell;

"I have come to play a game with you,

"But the answer I won't tell!

"Who Am I?"

What was the purpose of that, if any? [33]

A. Well, it was to design these little dolls as closely as my wife could to represent the characters they were to represent.

Q. In other words, "Little Red Riding Hood" was designed to depict Little Red Riding Hood and the same is true of "Little Bo-Peep" and the rest?

A. That is right. There was the matter of a

(Testimony of Maurice Juster.)

guessing game for the child to guess the character they were to represent.

Q. Is that how the term "Who Am I" originated?

A. Yes; we couldn't think of anything else to put on there, and we thought that that would be the answer.

Q. Was "Fairylend Series"—they were all fairylend, story book or nursery rhyme characters, were they? A. They were.

Q. During that time did you put out other dolls?

A. Yes, we put out the "Little Lady Series" and the "Foreign Series" and the Nun doll.

Q. I show you "Who Am I" No. 206, and ask you if you can identify that for me?

A. That is "Little Miss Donnett"; she wore a big bonnet.

Q. And the big bonnet is one of the identifying characteristics of the doll? A. That is right.

Q. That doll that I have just handed you was produced by the partnership, was it? [34]

A. Yes.

Q. Prior to the time when the Dollcraft Company became a corporation? A. Yes.

Mr. Mellin: I ask that the dolls just produced be received in evidence as plaintiff's Exhibit No. 21.

The Court: Admitted next in order.

The Clerk: Plaintiff's 21 in evidence.

(Thereupon "Little Miss Donnett" doll was received in evidence and marked plaintiff's Exhibit No. 21.)

(Testimony of Maurice Juster.)

Q. (By Mr. Mellin): I show you a doll of the "Who Am I" series and ask you if you can identify it? It is No. 207.

A. That is "Hansel" from the story "Hansel and Gretel."

Q. And is this doll designed to depict certain characteristics or a particular character in the story book character of Hansel and Gretel?

A. Yes.

Mr. Mellin: I offer that one in evidence as the next in order.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 22 in evidence.

(Thereupon "Hansel" doll was received in evidence and marked plaintiff's Exhibit No. 22.)

Q. (By Mr. Mellin): I show you another doll, "Who Am I," No. 208 on the box, and ask you if you can identify it? [35]

A. Yes, it is "Gretel."

Q. And is that dressed to illustrate a character in story book tales?

A. Yes, her costume and her long braids.

Q. With respect to the "Hansel and Gretel" dolls, do you have with you illustrations of the story book that illustrates these dolls that I have just produced in evidence, 22 and 23?

Pardon me, may I offer the "Gretel" doll just identified by the witness as plaintiff's exhibit next in order?

(Testimony of Maurice Juster.)

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 23 in evidence.

(Thereupon "Gretel" doll was received in evidence and marked plaintiff's Exhibit No. 23.)

Mr. Orr: I want to make a statement at this time: that possibly countless books illustrating these various characters can be found and there are no two illustrations that would be anywhere near alike, so I think it is completely irrelevant and immaterial to introduce books of that kind at this time.

Mr. Mellin: I would be perfectly willing to stipulate that the dolls that we have offered are reproductions or illustrations of the characters we refer to if counsel would like to have this type of stipulation.

Mr. Orr: We are not willing to stipulate. They are merely the crudest idea of a particular character that they sought to depict, and there is nothing quaint or nothing material about [36] the particular source of the book from which they derived their ideas. Any two persons would make a completely different design; no two would make this——

The Witness: May I interrupt?

Mr. Mellin: Just a minute; we will do the talking, Mr. Juster.

The Court: Indicate the purpose of the offer.

Mr. Mellin: The purpose is this, Your Honor: We maintain, and I think it is a fact, that these dolls all depict these characters having certain characteristics that appear in the children's books

(Testimony of Maurice Juster.)

and have for years, like Little Red Riding Hood, Hansel and Gretel, and so on and so forth, so the children could pick them out as fairy tale characters. We know it is a fact. I have to prove it unless counsel is willing to stipulate that that we find those characteristics in some illustrations of those characters.

Mr. Orr: On the other side we must recognize that these are fictional characters; they never were real persons; they are purely fictional, and every illustrator in a book of that kind would have his own individual ideas of what that character might look like, just as every artist would have a different idea of how he would dress that doll. There is nothing evidenciary to indicate what each artist in this book may have drawn his or her conception of Hansel and Gretel from or any of the other characters involved here. They each have [37] their individual ideas. There isn't a representation of an individual character that ever existed.

The Court: I will allow it subject to a motion to strike; overrule your objection.

Q. (By Mr. Mellin): I hand you a story book, "Hansel and Gretel," and ask you if you can identify it?

A. Yes, it is a book, "Hansel and Gretel."

Q. Where did it come from?

A. It was sent to us by Joseph Harne.

Q. When was that? A. In 1947.

Q. That is while it was a partnership?

A. Yes, approximately.

(Testimony of Maurice Juster.)

Q. And the two dolls which you have identified, "Hansel" and "Gretel," in all essentials depict the two characters in this book as illustrated in this book?

A. Yes.

Mr. Mellin: I will offer the book in evidence as plaintiff's exhibit next in order.

The Court: It may be admitted.

(Thereupon book entitled "Hansel and Gretel" was received in evidence and marked plaintiff's Exhibit No. 24.)

Q. (By Mr. Mellin): And will you tell us whether that is the general fashion of selecting the doll characters of the others that we have referred to in addition to "Hansel" and "Gretel," [38] that is, out of story book or nurse rhyme tales?

A. Yes; otherwise your conception might be so far from the general conception that you would be way off base.

Q. (By Mr. Mellin): I show you what is supposed to be a duplicate invoice of a sale to the May Company, and I notice on there a bill for "Fairyl-land Series." Are those the dolls which we have just been discussing?

A. Yes, they are.

Q. So they were sold as early as February, 1948.

Mr. Mellin: I will offer that invoice in evidence as next in order, Your Honor.

The Court: Let it be admitted.

The Clerk: Plaintiff's Exhibit 25 in evidence.

(Testimony of Maurice Juster.)

(Thereupon invoice referred to above was received in evidence and marked plaintiff's Exhibit No. 25.)

Q. (By Mr. Mellin): I hand you what appears to be an order blank, and it is identified in this proceeding as defendant's Exhibit "C" for identification by the notary, and I will ask you if you can identify it? A. Yes, I can.

Q. And what is it, please?

A. It is a mimeographed order blank and catalog sheet.

Q. Of the Dollcraft Company?

A. Of the Dollcraft Company.

Q. The co-partnership or the corporation? [39]

A. The co-partnership.

Q. Does it have a date?

A. February 26th, 1948.

Q. And that has on it, does it, the little fairy land jingle of "Who Am I"?

A. That's right.

Mr. Mellin: I will offer that into evidence as next in order.

The Court: Let it be admitted.

The Clerk: Plaintiff's Exhibit 26 in evidence.

(Thereupon mimeographed order blank referred to above was received in evidence and marked plaintiff's Exhibit No. 26.)

Q. (By Mr. Mellin): I show you a doll which is apparently not identified on the box other than "Globe Trotter" series, and ask you what it is?

(Testimony of Maurice Juster.)

A. It is a little Dutch doll—a little Dutch girl.

Q. What series is that?

A. That is from our foreign series.

Q. When was that made?

A. That was designed previous to '46, but it wasn't actively manufactured until '47.

Mr. Mellin: I will offer that in evidence as a typical—the foreign series each one represents a country and each country is an authentic representation. That is the little Dutch girl? [40]

A. That is the little Dutch girl.

Mr. Mellin: I will offer that as typical of the foreign series, next in order.

The Court: Let it be admitted and marked.

(Thereupon little Dutch girl doll referred to, above was received in evidence and marked plaintiff's Exhibit No. 27.)

Q. (By Mr. Mellin): During the time that the doll company was a co-partnership, did you manufacture a doll which was dressed as a bride?

A. Yes, we did.

Q. What did you call that doll?

A. We called it "June," after my wife's cousin.

Q. I show you a box with a doll in it dressed to represent a bride, and ask you if that is the doll?

A. Yes, that is the doll.

Q. And that is designed to depict a bride, is it?

A. A bride.

Mr. Mellin: I will offer that in evidence as plaintiff's next in order.

(Testimony of Maurice Juster.)

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 28 in evidence.

(Thereupon doll called "June" was received in evidence and marked plaintiff's Exhibit No. 28.)

Q. (By Mr. Mellin): Prior to the time that you became a corporation, that is Dollcraft Company became a corporation, did [41] Mr. Kerr or Mr. Hinz have any financial or other interests in the Dollcraft Company, a co-partnership? A. No.

Q. Were they actively associated with that company in any capacity as far as its manufacture and sale of dolls was concerned?

A. No, all they did was supply us with doll bodies.

Q. You bought doll bodies from them. How long have you done that?

A. From the time we dressed our first doll until we incorporated.

Q. And that was purely a relationship of buyer and seller? A. That is right.

Q. You bought the bodies from them and they sold them to you, is that correct?

A. That is right.

Q. During that time had you ever met Mr. Kerr or Mr. Hinz? A. No.

Q. When did you first meet them, if you know?

A. We came down to look at their plant; I forget just exactly when it was.

(Testimony of Maurice Juster.)

Q. It was——

A. Mr. Patterson wanted us to see the plant, and he drove us down one day and Mr. Kerr showed us through the kilns and the molds and everything else, just to see how a little doll was [42] manufactured, because up until that time we never knew the first thing about how they were made.

Q. And what part in this partnership business did Mrs. Elise Juster play?

A. She did all the designing, she broke the girls into dressing and making of the dresses and little jobs like billing and so on and so forth.

Q. What did you do?

A. Helped to buy the materials. What I did?

Q. Yes.

A. I helped buy the materials, trimmings, packed the orders, shipped the orders, did a little selling.

Q. Do you still manufacture the “Little Lady Series” that you have been speaking of—that is, the corporation?

A. The corporation has expanded the “Little Lady Series” in different styles. Some of the names from the “Little Lady Series” are now in the corporation line.

Q. I hand you what appears to be a little brochure with doll names on it issued by the Dollcraft Company at Santa Clara, and ask you if that is a list of the dolls that were manufactured and sold by the Dollcraft Company prior to November of 1949?

A. Yes.

(Testimony of Maurice Juster.)

Q. And how many dolls does that represent that they are selling? [43]

A. Oh, I think there was about fifty some odd numbers.

Q. How many of those are characters out of nursery rhyme story books, and so forth?

A. Twelve.

Q. We had eight that were previously made by the co-partnership; it includes four in addition?

A. Yes; we rounded it out to make a dozen.

Mr. Mellin: I offer the brochure just identified by the witness in evidence as next in order.

The Court: It may be marked.

(Thereupon brochure referred to above was received in evidence and marked plaintiff's Exhibit No. 29.)

Q. (By Mr. Mellin): What characters did you add, Mr. Juster, if you recall?

A. "Bessie Brooks" and "Rapunzel," "Sugar and Spice," "Goldilocks." I believe that was—we took out some and added others.

Q. Which ones did you take out and which ones did you add?

A. We took out "Hansel" for one; "Miss Donnett," and added others.

Q. What was the reason for that, if you know?

A. They didn't—well, for one, a little boy doll doesn't seem to sell too well, so we replaced it with a girl, and I think as the material gave out on

(Testimony of Maurice Juster.)

“Miss Donnett,” why, we replaced it with a different character, that is all. [44]

Q. Is there anything that dictates the particular material in the dresses of dolls from time to time?

A. Yes.

Q. What is that?

A. As one material runs out, you replace it with another; the same with trimmings.

Q. In other words, trimmings and dress materials that you buy for dolls are changed seasonally or yearly?

A. That’s right.

Q. Just like other materials for the women’s dresses that are on the market, and that dictates to some degree the materials used in making dolls’ as well as women’s dresses?

A. That’s right.

Q. At the present time you are making and putting out dolls which carry the names of the dolls which they depict, is that correct or incorrect—the characters which they depict?

A. Yes.

Q. You have “Red Riding Hood,” “Miss Muffett,” “Little Bo-Peep,” “Mistress Mary,” “Alice in Wonderland,” and what others?

A. As of now, there is—after that first five, there is “Polly Flanders,” “Rapunzel,” “Gretel,” “Curly Locks,” “Goldilocks,” “Sugar and Spice” and “Bessie Brooks.”

Q. I hand you a doll in a bottle and ask you if you can identify it?

A. Yes, that is “Red Riding Hood.” [45]

(Testimony of Maurice Juster.)

Q. And it has "Red Riding Hood" on it?

A. Yes, it has.

Q. When did you commence putting the actual names of the dolls, that is, the characters they represent, on the packages or bottles in which they are contained?

A. Approximately September, 1948.

Q. That was after the incorporation of Dollcraft Company into a corporation?

A. Yes.

Q. What if anything prompted that move, Mr. Juster?

A. Well, we received quite a few letters from our accounts requesting that the dolls be identified on the box to make it easier for the stock girls when the dolls were on the shelf, and they don't have to memorize that Number 201 was "Red Riding Hood," it would be right on the box.

Mr. Mellin: The doll just identified by the witness is offered in evidence as plaintiff's next in order. May the record show that it was plaintiff's Exhibit 1 for identification to the deposition herein?

The Court: No objection. So ordered.

The Clerk: Plaintiff's Exhibit 30 in evidence.

(Thereupon "Red Riding Hood" doll referred to above was received in evidence and marked plaintiff's Exhibit No. 30.)

Q. (By Mr. Mellin): I hand you Exhibit 30 and Exhibit 15. One is "Little Red Riding Hood" as produced by the plaintiff [46] subsequent to the incorporation of the Dollcraft Company and the

(Testimony of Maurice Juster.)

other was the one that was produced by the partnership. What are the differences, if any, between those two dolls?

A. There is no difference at all in the costuming; it is one doll is a little smaller than the other.

Q. But their costuming is almost identical?

A. Yes.

Q. At least it is identical in substance?

A. That is right.

Q. When did you commence putting these dolls in bottles, Mr. Juster? A. About June of '49.

Q. June of '49? A. '49, yes.

Q. And that bears "Dolls With a Story by Dollcraft Company, Santa Clara, California," on the bottle? A. That's right.

Q. And in more or less larger letters on the rim of the cap "Dollcraft Co., Santa Clara," is that correct? A. Yes.

Q. Did you put all of the "Fairyland Series" of dolls in bottles? A. No.

Q. Which ones did you put in bottles and which ones didn't you? I show you Number 203, "Little Bo-Peep." Is that one of [47] the products of the corporation? A. Yes.

Mr. Mellin: May I offer that in evidence as plaintiff's Exhibit next in order?

The Court: Let it be admitted and marked.

Mr. Mellin: May the record show that it was plaintiff's exhibit No. 5 for identification in the depositions in this action?

(Testimony of Maurice Juster.)

(Thereupon "Little Bo-Peep" doll referred to above was received in evidence and marked plaintiff's Exhibit No. 31.)

Q. (By Mr. Mellin): I notice these bottles of the "Little Red Riding Hood," Exhibit 30, and "Little Bo-Peep," Exhibit 31, also carry a number. How does that number correspond, if at all, with the number of the "Who Am I" series?

A. They are identical.

Q. In other words, 201 in the "Who Am I" series represented a Little Red Riding Hood and that number carried over into the new lot?

A. That is right.

Q. I show you a doll marked 202, "Little Miss Muffet, Dollcraft Company, Santa Clara, California," and ask you if that is one of the dolls manufactured by the plaintiff corporation?

A. Yes, it is.

Q. And the marking of the name of the character which it [48] represents, "Little Miss Muffett," was applied to that subsequent to the time when the plaintiff became a corporation?

A. Yes.

Mr. Mellin: I offer "Little Miss Muffett" in evidence, Your Honor, as next in order.

The Court: Admitted next in order.

The Clerk: Plaintiff's Exhibit 32 in evidence.

(Thereupon "Little Miss Muffett" doll referred to above was received in evidence and marked plaintiff's Exhibit No. 32.)

(Testimony of Maurice Juster.)

Q. (By Mr. Mellin): I now hand you a doll which carries the name of "Mistress Mary, Dollcraft Company, Santa Clara, California," and ask you if you can identify it? A. Yes.

Q. And what is it, please?

A. "Mistress Mary."

Q. Is that a product of the plaintiff corporation? A. Yes, it is.

Q. That was the title of the character of the doll which it depicts, "Mistress Mary." Was that applied to the carton subsequent to the time when the plaintiff became a corporation?

A. That's right.

Q. And about what time was that?

A. September of '49—I mean '48.

Mr. Mellin: I offer that doll in evidence as plaintiff's [49] exhibit next in order.

The Court: Let it be admitted.

Mr. Mellin: And I call attention on the record to the fact that it is Exhibit 7 for identification to the depositions in this action.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 33 in evidence.

(Thereupon "Mistress Mary" doll referred to above was received in evidence and marked plaintiff's Exhibit No. 33.)

Q. (By Mr. Mellin): I now show you a doll which bears the name of "Little Miss Donnett, Dollcraft Company, Santa Clara, California," and ask you if that is a product of the plaintiff corpora-

(Testimony of Maurice Juster.)

tion and was manufactured by the plaintiff corporation subsequent to its incorporation? A. Yes.

Q. And the name of the character which it depicts, Little Miss Donnett, was applied to the carton subsequent to the time of the incorporation?

A. Yes.

Mr. Mellin: I will offer the doll representing "Little Miss Donnett" as plaintiff's next in order.

The Court: It may be admitted.

The Clerk: Plaintiff's Exhibit 34 in evidence.

(Thereupon "Little Miss Donnett" doll referred to above was received in evidence and marked plaintiff's Exhibit No. 34.) [50]

Q. (By Mr. Mellin): I now show you a doll which apparently depicts "Curly Locks, No. 209, Dollcraft Company, Santa Clara," and ask you if that is a product of the plaintiff?

A. Yes, it is.

Q. And the name "Curly Locks" was applied to the doll depicting that character Curly Locks subsequent to the incorporation of the plaintiff, was it, or not? A. Yes.

Q. It was? A. Yes.

Mr. Mellin: The Reporter can't hear you nod, Mr. Juster.

A. I'm sorry.

Mr. Mellin: I offer the doll just identified by the witness as plaintiff's next in order and call attention to the fact that it is plaintiff's Exhibit No. 9 for identification to the depositions.

(Testimony of Maurice Juster.)

The Court: It may be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 35 in evidence.

(Thereupon "Curly Locks" doll referred to above was received in evidence and marked plaintiff's Exhibit No. 35.)

Q. (By Mr. Mellin): I hand you a doll in a carton which is characterized as "Goldilocks, Dollcraft Company, Santa Clara, California," and ask you if that is a product of the plaintiff?

A. Yes, it is.

Q. The name "Goldilocks" was applied to the carton by this [51] plaintiff after it became a corporation, is that correct? A. Yes.

Mr. Mellin: I offer that doll in evidence as plaintiff's next in order.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 36 in evidence.

(Thereupon "Goldilocks" doll was received in evidence and marked plaintiff's Exhibit No. 36.)

Q. (By Mr. Mellin): I hand you a doll in a bottle which bears the name of the doll as "Sugar and Spice, Everything Nice, No. 211, Dollcraft Company, Santa Clara," and ask you if that is a product of the plaintiff? A. Yes, it is.

Q. That was produced prior to November, 1949, was it—prior to November, 1949? A. Yes.

Q. And the caps bearing the names which the

(Testimony of Maurice Juster.)

dolls depict were applied subsequent to the time when the plaintiff became a corporation, is that correct? A. That is right.

Mr. Mellin: I will offer "Sugar and Spice," as plaintiff's exhibit next in order.

The Court: It may be admitted.

The Clerk: Plaintiff's 37 in evidence.

(Thereupon "Sugar and Spice" doll, referred to above, was [52] received in evidence and marked plaintiff's Exhibit No. 37.)

Mr. Mellin: And I call attention to the fact that it is plaintiff's Exhibit No. 3 for identification in the depositions.

Q. I notice that there is a little tab "Patents Pending" on this bottle. What does that represent? Is that for the carton or for the doll?

A. That is for the carton, the patent for the bottle.

Q. I hand you a doll which appears to be dressed as a bride and it says on the outside "June, 120, Dollcraft Company, Santa Clara, California," and ask you if that is a doll produced by this plaintiff?

A. Yes, it is.

Q. And that doll is supposed to depict a bride, is it? A. Yes.

Q. Does it differ in any essential detail from the doll which you call "June" and which was dressed and sold by the Dollcraft Company when it was a partnership? A. No.

Mr. Mellin: I will offer that as next in order.

(Testimony of Maurice Juster.)

The Court: It may be admitted and marked.

(Thereupon "June" doll referred to above was received in evidence and marked plaintiff's Exhibit No. 38.)

Mr. Mellin: May I call attention to the record that the doll just identified was plaintiff's Exhibit 15 to the depositions. [53]

Q. I show you a box containing a doll which bears the name of the doll "Rapunzel."

A. "Rapunzel."

Q. "Dollcraft Company, Santa Clara, California, No. 207," and ask you if that is a doll produced by this plaintiff? A. Yes.

Q. And that was produced by the plaintiff after it became a corporation, is that so? A. Yes.

Q. But not before? A. No.

Mr. Mellin: I will offer that doll in evidence as plaintiff's next in order.

The Court: It may be admitted and marked.

The Clerk: 39 in evidence.

(Thereupon "Rapunzel" doll referred to above was received in evidence and marked Plaintiff's Exhibit No. 39.)

Q. (By Mr. Mellin): I show you a doll the carton of which bears the doll's name as Gretel, Dollcraft Company, Santa Clara, California," and ask you if that is a doll produced by this plaintiff?

A. Yes, it is.

Q. I notice it bears the name "Gretel" on it?

(Testimony of Maurice Juster.)

A. That is right.

Q. And is this doll substantially different than the "Gretel" [54] which was produced by the partnership except in the design of the dress?

A. No.

Mr. Mellin: I offer that in evidence as next in order.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 40 in evidence.

(Thereupon "Gretel" doll referred to above was received in evidence and marked Plaintiff's Exhibit No. 40.)

Q. (By Mr. Mellin): I show you a doll which bears the name "Bessie Brooks, Dollcraft Company, Santa Clara," and ask if that is a product of the plaintiff? A. Yes, it is.

Q. Was that product produced before or after it became a corporation?

A. After it became a corporation.

Q. That would be after April of 1948, would it?

A. Yes.

Mr. Mellin: I offer it in evidence as the plaintiff's next in order.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 41 in evidence.

(Thereupon "Bessie Brooks" doll referred to above was received in evidence and marked Plaintiff's Exhibit No. 41.)

Q. (By Mr. Mellin): I now show you a doll

(Testimony of Maurice Juster.)

which is given the name "Alice in Wonderland" and ask you if that is a product of [55] this plaintiff?

A. Yes, it is.

Q. And that doll was produced by the plaintiff some time subsequent to its incorporation?

A. Prior and subsequent.

Q. In other words, while a partnership you put out a doll that represented Alice in Wonderland, did you? A. Yes.

Mr. Mellin: I will offer the doll just identified by the witness as plaintiff's next in order.

The Court: It may be marked.

The Clerk: 42 in evidence.

(Thereupon "Alice in Wonderland" doll referred to above was received in evidence and marked plaintiff's Exhibit No. 42.)

Q. (By Mr. Mellin): I notice that each of the cartons of these twelve dolls we have just offered in evidence, Mr. Juster, bore the notation "Fairyl-land Series" on it? A. That's right.

Q. Is that corresponding to the "Fairyl-land Series" of eight dolls put out by the partnership prior to the incorporation or not? A. Yes.

Q. So that the differences in the dolls other than their dress dictated by materials, the differences in the eight characters which were produced by the partnership and also by the corporation, [56] the difference was that in the "Who Am I" series you didn't directly apply the nursery rhyme or story book characters to them? A. That is right.

(Testimony of Maurice Juster.)

Q. But you subsequently did?

A. That is right.

Q. Were there any other essential differences between the eight dolls representing the eight characters which were produced by the partnership and by the corporation?

A. No, only a matter of difference in the materials as one ran out and was replaced, and a number dropped because it wasn't a good seller and replaced with one that did sell better.

Q. After the Dollcraft Company became a corporation did the duties of Mrs. Juster and yourself change from what they were in the partnership?

A. No, they didn't change basically at all; in fact we had more to do.

Q. Did Mr. Kerr or Mr. Hinz take an active part in the designing of the dolls or the production, that is dressing of the dolls or producing of the material?

A. For the doll dresses, no.

Q. What part did they play other than financially in the business after it became a corporation?

A. Policy meetings, might be one every four days or maybe one every week. [57]

Q. Could you tell us what in general was decided on the method of sales of the dolls?

A. The method of sales, what price, salesmen had to be fired or hired, should we take this salesman, or—things like that.

Q. Is Dollcraft Company the only customer that Kerr and Hinz——

A. No.

Q. To your knowledge?

(Testimony of Maurice Juster.)

A. To my knowledge they have other customers that buy bisque dolls.

Q. You get just the bare doll body from them, don't you? A. That is right.

Q. When I say "you" I mean the Dollcraft Company; and then you apply the dresses to them?

A. That is right.

Q. Over what area did the partnership Dollcraft Company sell this "Fairylane Series" of dolls?

A. Practically every state in the Union.

Q. So that the area did not change when it became a corporation? A. No.

Q. Was it common or uncommon before you began putting the names of the dolls right on the packages for customers to ask for dolls by their names rather than by their numbers?

A. Yes, quite a few letters came in asking for the dolls by [58] name rather than by number.

Q. When, if you know, did you actually commence applying the names of the dolls, of the characters they represent, on the packages of the dolls?

A. About September of '48.

Q. September of '48?

A. Aside from "Hansel" and "Gretel"; that was in 1947. That was one account, or two accounts, rather.

Q. That was a year ago last September, is that correct? A. Yes.

Mr. Mellin: I have my exhibits mixed here, your Honor. May I beg the Court's indulgence?

Q. I show you an invoice dated August 14, 1947,

(Testimony of Maurice Juster.)

and a letter attached to it. Was that received and transacted in the usual course of business?

A. Yes, it was.

Q. And that letter calls for a "Hansel and Gretel" doll, does it? A. Yes, it does.

Mr. Mellin: I will offer that invoice as exhibit next in order together with the letter.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 43.

The Court: It is now 12 o'clock. Let us take an adjournment. [59]

(Thereupon invoice dated August 14, 1947, and letter attached, were received in evidence and marked plaintiff's Exhibit No. 43.)

(Thereupon a recess was taken until two o'clock p.m. this date.) [59-A]

Monday, August 21, 1950, at 2 P.M.

MAURICE JUSTER

a witness called on behalf of the plaintiff, resumed the stand, and testified further as follows:

Direct Examination

(Continued)

By Mr. Mellin:

Q. I show you two orders, one is dated October 15, 1947, ordering "Hansel and Gretel" dolls. Was that received in the due course of business and on or about the date that it bears, by the Dollcraft Company? A. Yes.

(Testimony of Maurice Juster.)

Q. I show you a second dated August 2, 1946, ordering "Fairylend Series," "Red Riding Hood," "Bo-Peep," and ask you if that order was received by the Dollcraft Company in due course of business?

A. Yes.

Q. On or about the date it bears? A. Yes.

Mr. Mellin: I will offer the two orders in evidence as plaintiff's next in order.

The Court: They may be admitted and marked.

The Clerk: Plaintiff's Exhibit No. 44 in evidence.

(Thereupon two orders referred to above were received in evidence and marked Plaintiff's Exhibit No. 44.)

Q. (By Mr. Mellin): I hand you what appears to be an order [60] blank or price list, whatever it is, of Dollcraft Company, Santa Clara, California, and ask you if you can identify it?

A. Yes, I do.

Q. What is it, please?

A. It is a price list we put out in 1949.

Q. When in 1949, sir?

A. Depending on when we got that back from the printer; maybe January or February or March.

Q. 1949? A. Yes.

Q. Is that the price list of the dolls you were making at that time? A. Yes, it is.

Q. Is that the list of dolls you are making at this time or not?

A. No, some have been taken out and some have been added.

(Testimony of Maurice Juster.)

Mr. Mellin: I will offer that price list in evidence as plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 45 in evidence.

(Thereupon price list referred to above was received in evidence and marked Plaintiff's Exhibit No. 45.)

Q. (By Mr. Mellin]: Is this business of dolls generally, small dolls, whether they are Fairyland dolls or not, is it seasonal or unseasonal? [61]

A. Yes, it is seasonal.

Q. Will you tell us just a little bit about that? When is the period when you sell the dolls, that is, when you have the greatest number of orders?

A. The greatest number of orders are just about this time, for Christmas delivery.

Q. In other words, in the late summer or early fall?

A. That's right.

Q. That is because the orders come in considerably ahead of the delivery dates?

A. They are more and heavier.

Q. I show you a page from the San Francisco Chronicle of October 23, 1949, and I call your particular attention to an ad by Macy's:

"Exclusive bisque story doll. They stand. They come in glass container. They are removable for play. \$1.95."

Do you recognize whose products those are?

A. Yes.

(Testimony of Maurice Juster.)

Q. And whose are they?

A. They are our dolls.

Mr. Mellin: I will offer that advertisement in evidence as plaintiff's next in order.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 46. [62]

(Thereupon advertisement referred to above was received in evidence and marked Plaintiff's Exhibit No. 46.)

Q. (By Mr. Mellin): Had you previous to that time sold Macy's your "Fairyland Series" of dolls?

A. Not our "Fairyland Series." We had sold Macy's under the name of O'Connor-Moffatt.

Q. I mean O'Connor-Moffatt. How about just previous to this ad of October 23, 1949?

A. No, not just previous; we sold them previously.

Q. Will you tell us about it, please?

The Court: Macy is the successor of O'Connor and Moffatt.

Mr. Mellin: Yes, I understand.

A. Yes.

Q. You had sold O'Connor & Moffatt?

A. We had sold O'Connor & Moffatt.

Q. Those dolls that are depicted in that ad?

A. No.

Q. I want to know about those dolls. Did you sell them those?

A. No, that is the first.

Q. That is not the sale?

(Testimony of Maurice Juster.)

A. That was the first order we sold them was those dolls in the jars.

Q. When had you sold those, do you know?

A. Just about a week before the ad appeared I believe we made delivery. [63]

Q. In other words, the dolls that appear in the ad and had been sold some time previously to Macy's?

A. Oh yes, surely.

Q. But prior to that time you had sold O'Connor & Moffatt?

A. Not the dolls in the jars, no. Do you mean dolls?

Q. I am asking about the dolls depicted in the advertisement I just showed you—that is the first time that you sold them those, the first time you sold Macy's?

A. That is right.

Q. I show you what purports to be an order of Macy's, San Francisco, dated 10/21—that would be October 21st—together with certain other moving papers including your own order and a bill, and ask you if you can identify it?

A. That's right, all doll papers.

Q. Those dolls, do you recognize them?

A. Yes.

Q. Those papers are documents of the transaction with Macy's with regard to "Fairyländ" dolls, dolls under glass?

A. That is right.

Q. And dolls depicting fairyländ, nursery rhyme or story book characters?

A. That's right.

(Testimony of Maurice Juster.)

Q. Named in the advertisement that was referred to?
A. That is right.

Q. These are the papers selling the dolls referred to in that [64] advertisement?

A. That is right.

Mr. Orr: I would suggest that the witness do the testifying, counsel, instead of counsel.

Mr. Mellin: I didn't mean to be out of order.

The Court: He is doing that in the interests of time.

Mr. Mellin: I will offer that in evidence.

(The invoice and papers referred to were marked Plaintiff's Exhibit No. 47 in evidence.)

Q. (By Mr. Mellin): Immediately following October 23, 1949, which was the date of the advertisement, what occurred, if anything, with respect to these dolls that Macy's had and that you sold them?

A. Well, the first thing Macy's got in touch with us and told us that they had a letter from Nancy Ann Doll Company.

Q. I show you what purports to be a copy of a letter dated October 24th on the letterhead of the firm of Charles S. Evans, attorneys and counselors and directed to Macy's, Stockton and O'Farrell, San Francisco 8. Is that the letter you referred to?

A. Yes.

Q. And that is the one, is it, or is it not, that Macy's advised you that they had received from the attorneys for the Nancy Ann?

A. That is right. [65]

(Testimony of Maurice Juster.)

Mr. Mellin: May I offer that copy in evidence as the plaintiff's next in order?

The Clerk: 48 in evidence.

(Thereupon letter referred to above was received in evidence and marked Plaintiff's Exhibit No. 48.)

Q. (By Mr. Mellin): What, if anything did Macy's do about returning the dolls to you, if they did?

A. First they notified us that they were going to send them back, and as soon as it was convenient for them, they did so—all the unsold portion of the order.

Q. I hand you what is a claim for credit of Macy's, San Francisco, dated 12/2/49, and ask you what transaction does that relate to, do you know?

A. That is it; that is the part they sent back.

Q. That is for the dolls in the advertisement?

A. Yes.

Q. And I show you what appears to be a credit memo from you to Macy's and ask you to identify it?

A. That is right; that is what it is.

Q. That is giving them credit for the returned dolls?

A. Yes.

Q. Were you advised personally by Macy's or anyone connected with Macy's the reason for returning those dolls?

A. Pardon me?

Mr. Mellin: Would you read the question? [66]

(The Reporter read the question.)

(Testimony of Maurice Juster.)

A. Well, there was a question of receiving the letter, they didn't like that, and shortly after we got the dolls back.

Mr. Mellin: I offer the two documents of the claim for credit of Macy's of San Francisco in evidence, your Honor, as plaintiff's next in order.

The Court: What amount?

Mr. Mellin: \$294.00.

The Court: What was it originally?

Q. (By Mr. Mellin): What was the reason they were returned, he wanted to know.

The Witness: Pardon me; he wanted to know the original amount of the order.

The Court: Yes, I asked you the amount.

Mr. Mellin: I beg your pardon; I misunderstood.

Q. What was the original order?

A. Forty dozen at twelve dollars.

Q. How much would that be?

A. I don't remember the amount.

The Court: \$480.

The Witness: Forty dozen at twelve dollars a dozen.

The Court: Twelve times forty, \$480.

Mr. Mellin: And the credit amount is \$294.

The Court: Let it be admitted and marked.

The Witness: They returned a little over half the order. [67]

The Clerk: Plaintiff's Exhibit 49 in evidence.

(Document referred to was received in evidence and marked Plaintiff's Exhibit No. 49.)

(Testimony of Maurice Juster.)

Mr. Mellin: I offer the credit memorandum.

The Court: It may be admitted and marked.

The Clerk: 50 in evidence.

(Credit memorandum referred to was received in evidence and marked Plaintiff's Exhibit No. 50.)

Q. (By Mr. Mellin): To your knowledge has Dollcraft been able to sell Macy's since that time?

A. No.

Q. Have any other customers of Dollcraft to your knowledge been notified? A. Yes.

Q. Of infringement of alleged trade-marks by this defendant? A. Yes.

Q. I hand you a letter on the letterhead of Charles S. Evans, directed to the West Coast 5c and 25c Store, dated November 2, 1949, and ask you if that was received by you from the addressee?

A. Yes.

Q. And with that letter I hand you a letter of November 3, 1949, directed to the Dollcraft Company from the West Coast 5, 10 and 25c Stores. Was that received by you in due course of mail? [68]

A. Yes.

Q. On or about the date it bears? A. Yes.

Mr. Mellin: I will offer those two letters in evidence, your Honor, as the next in order.

The Court: They may be admitted and marked.

The Clerk: Plaintiff's 51 in evidence.

(Testimony of Maurice Juster.)

(The two letters referred to were thereupon marked Plaintiff's Exhibit No. 51 in evidence.)

Q. (By Mr. Mellin): I hand you a copy of a letter on the letterhead of Charles S. Evans, directed to the Cliff House Gift Shop, Point Lobos Avenue, San Francisco, and ask you if that was received by you from the Cliff House Gift Shop. A. Yes.

Q. I hand you a letter on the letterhead of the Cliff House Gift Shop dated November 16, 1949, and ask you if that was received by you in the due course of mail together with the letter from the attorneys for the Nancy Ann? A. Yes.

Q. And the letter of November 16th from the Gift House reads as follows—it is directed to Mr. J. Hursh, 291 Sutter Street. That is one of your accounts? A. Yes.

Q. And this was received by you from Mr. Hursh? A. That is right. [69]

Mr. Mellin: "In view of the pending lawsuit, involving Dollcraft, we are today returning 55 of the original order of six dozen, which we purchased on October 6.

"We are deducting this amount from the invoice and are enclosing herewith a check in the amount of \$17.00."

Q. Were those dolls subsequently received by you? A. Yes, they were.

Q. And did you give credit to the Cliff House Gift Shop for them? A. We did.

(Testimony of Maurice Juster.)

Mr. Mellin: I offer those two letters in evidence as the next in order.

The Court: They may be marked.

The Clerk: Plaintiff's Exhibit 52 in evidence.

(The two letters referred to were thereupon marked Plaintiff's Exhibit No. 52 in evidence.)

Q. (By Mr. Mellin): I hand you a letter directed to the Victor Market, 2324 Chestnut Street, San Francisco, Calif., directed by Charles S. Evans to them. Was that received by you from the addressee? A. Yes.

Q. I hand you what appears to be credit memorandums to Whitney's at the Beach, account Cliff House Gift Shop. Can you identify those?

A. Yes. [70]

Q. What are they, please?

A. Merchandise returned from them.

Q. And that is pursuant to the letters we have just been discussing? A. Yes.

Mr. Mellin: I will offer the letter directed to the Victor Market under date of November 2, 1949, as plaintiff's next in order.

The Court: It may be admitted.

The Clerk: Plaintiff's Exhibit 53 in evidence.

(The letter of 11/2/49 to the Victor Market was thereupon marked Plaintiff's Exhibit No. 53 in evidence.)

Mr. Mellin: I will offer the two credit memorandums just identified by the witness as one exhibit.

(Testimony of Maurice Juster.)

The Court: They may be admitted.

The Clerk: Plaintiff's Exhibit 54.

(Two credit memorandums referred to were thereupon marked Plaintiff's Exhibit No. 54 in evidence.)

Mr. Mellin: That is all, counsel.

Cross-Examination

By Mr. Orr:

Q. When did you first learn about Mrs. Juster's interest in the matter of dressing little dolls?

A. When I was on Guam.

The Court: When what?

A. When I was on Guam in 1945. [71]

Q. (By Mr. Orr): Do you know what progress she made in that art at that particular time?

A. No; all she did was write me a letter that she was going into research of costumes at that time.

Q. What nature of costumes did she have in mind at that time? A. Foreign costumes.

Mr. Orr: Let me state for the record at this time that I observed that Mrs. Juster was not in court. Last Friday I had a subpoena issued to myself and took a process server down to Santa Clara to serve her Saturday morning. To my surprise I learned that she had just been rushed to the hospital for an emergency operation and would not be able to appear. So I instructed the server to withdraw the service of the summons. That was dropped at that time.

(Testimony of Maurice Juster.)

I have in mind that there may be some information that we will want in this case that she would be best qualified to give. I will direct my questions to Mr. Juster with the hope that his answers will suffice. If we find that some of the information is available only through Mrs. Juster, we will have to figure out some way of bringing that into the record. But for the present I would like to have my examination of Mr. Juster understood with the view that I am asking some of the questions that I would normally have asked Mrs. Juster.

Q. Do you know to what sources Mrs. Juster referred in regard to the costumes of dolls that she had in mind? [72]

A. She had some old costume books that she had; I think she got them at the State Library in Washington—not in Washington; in Sacramento.

Q. By costume books, what do you mean? Catalogues?

A. No, I mean costume books, reference books.

Q. Reference books?

A. That are not in print; collectors' items.

Q. Do you know what progress she had made in that research at the time of your return from service?

A. Yes; she had, oh, approximately 20 sketches, colored sketches that she had all finished. She knew just what she was going to do with them.

Q. And were all of those directed to the national costume type of dolls?

A. That is right.

(Testimony of Maurice Juster.)

Q. Had she made any of the dolls at that time on your return from the service?

A. No, she had not.

Q. How long after your return was it before she did make the first actual dolls—that is, dressed the first actual dolls?

A. Let's see; I think it was about May or June of '46.

Q. And do you recall what the first doll was that she dressed?

A. Yes. I am pretty sure the first two she dressed were the "Dutch Boy" and a "Dutch Girl," and of course the others followed; "Czechoslovakian Boy and Girl"; "Dutch Boy and Girl"; [73] I can't recall them all in order, but I think those were the first ones.

Q. When was it that dolls of that type, that is, foreign costumed dolls, were put into commercial production by your organization?

A. In 1947.

Q. When in 1947?

A. I can't recall now exactly.

Q. Were they the first dolls made by your company?

A. No, the first dolls we made were the "Little Lady Series."

Q. When did Mrs. Juster begin the designing of the "Little Lady Series"?

A. When she found out how tough it was to try to get materials to put into the foreign dolls, she made a complete switchover to the little short dresses of felt and available materials.

(Testimony of Maurice Juster.)

Q. Where did Mrs. Juster secure the little doll bodies that she used for dressing her first set of dolls?
A. From Mr. Patterson.

Q. Who is Mr. Patterson?

A. Mr. Patterson is an old friend of the family, and at that time he was selling undressed dolls for Kerr and Hinz of Santa Clara.

Q. You say an old friend of the family; that is jointly of you and Mrs. Juster? [74]
A. Yes.

Q. Or you and your family or Mrs. Juster and her family?

A. Of my side of the family. His brother-in-law used to go with my sister.

Q. How long ago was that?

A. Oh, as far back as '39, I think.

Q. How long have you been married, Mr. Juster?

A. Oh, about—it should be exact, shouldn't it? I think 12 years or 13 years.

Q. Have you any children?

A. I have three children.

Q. Boys or girls?

A. I have two girls and a boy.

Q. And how old are the girls?

A. The girl is 12—11—time flies; I think it is 11—11 and 2 for the girls, and the little boy is 6.

Q. During the war period do you know whether or not your daughters, or the older one at least, collected little dressed dolls?

A. The first time I saw a little doll was when I came back from overseas.

(Testimony of Maurice Juster.)

Q. And what did you find in the way of a doll collection at that time?

A. I know that a neighbor had given her a bride for her birthday; what else I don't know, not off-hand. [75]

Q. You were the party who gave a deposition in this proceeding a few months ago? A. Yes.

Q. Do you recall that at that time you stated that Mrs. Juster had acquired a cabinet which she antiqued, prepared for a collection of "Nancy Ann" dolls? A. That is right.

Q. And that collection did include a number of "Nancy Ann" dolls? A. That is right.

Q. Do you recall the names of any of those dolls?

A. No. I am sorry you didn't hear me shake my head.

Q. The first dolls that your wife dressed, were they delivered to her personally by Mr. Patterson?

A. Yes, he brought them right up to the apartment.

Q. And was there discussion at the time as to how the dolls should be dressed? A. No, sir.

Q. Had the subject previously been discussed with Mr. Patterson? A. Not that I know of.

Q. In the course of the deposition that we took some time ago, didn't you indicate that Mr. Patterson had expressed admiration for some of the designs that she had devised and disclosed to him? [76]

A. All Mr. Patterson had seen previous to bringing her the dolls was the foreign doll sketches.

Q. How long before the time he brought the doll

(Testimony of Maurice Juster.)

bodies was it that he was shown the foreign doll sketches?

A. Oh, a matter of two or three months.

Q. Had you or Mrs. Juster conferred with him at any time between the first disclosure and the time he brought the dolls? A. No.

Q. Had you had any discussion or correspondence with him about them?

A. No. You know, after all, Mr. Orr, he only brought a dozen dolls.

Q. Did you ask him to bring them? A. No.

Q. Or did he bring them voluntarily? Whose idea was it that he bring them?

A. It wasn't my idea.

Q. Was it Mrs. Juster's?

A. It might have been, yes.

Q. Was it Mr. Patterson's?

A. It might have been; I don't know; I can't answer.

Q. You say there were just a dozen of those particular dolls?

A. That is about all, just a dozen.

Q. How were those dolls dressed? [77]

A. They weren't dressed, they were undressed.

Q. When Mrs. Juster designed costumes and applied them to the dolls, what kind of costumes were they?

A. Well, I think, as I say, a few of them were dressed in the foreign costumes, and a few of them were dressed in the short dresses. You can't do much with only a dozen dolls.

(Testimony of Maurice Juster.)

Q. Could you give us a little more definite——

A. You mean description?

Q. A little more definitely your recollection of how many foreign dolls were made and what were they.

A. Well, I told you, Mr. Orr, that the closest I can remember, there was about three pair of the foreign dolls, that makes six; so there probably was six of other kinds.

Q. After your wife's dressing of this first group of twelve dolls, how long was it before you really got into commercial production?

A. Well, we didn't go into production until after I got a couple of orders. I sold the City of Paris—City of Paris and the White House, and we went immediately into production. I didn't dare go out selling any more.

Q. Who secured those orders?

A. I did.

Q. Did Mr. Patterson ever do any selling for you?

A. Yes, he took——

Q. When did he begin? [78]

A. Pardon me?

Q. When did he begin his activities selling for you?

A. Well, he procured that order from Joseph Horne for us, and that was in 1947, the latter part of 1947.

Q. Is that one of the orders that has been identified in this proceeding?

A. Yes, the "Hansel and Gretel" order.

(Testimony of Maurice Juster.)

Q. You say that Mr. Patterson was the one who secured that order for you? . A. Yes.

Q. Was that the first order that he secured for you?

A. I don't know; I can't remember. I am pretty sure it was, because I don't think he actively started selling for us until '48.

Q. You say you yourself procured an order from the White House?

A. That was the first two orders we ever received.

Q. The White House and the City of Paris and those you sold yourself? A. Yes.

Q. Do you recall how many dolls were involved in those orders?

A. About a gross to one and about a gross and a half to the other one.

Q. How long did it take you to fill those orders?

A. I don't know; not too long. We made the delivery dates, and it was before Christmas. [79]

Q. Do you recall the date of the order?

A. Let's see. I guess it was October, '46.

Q. What was Mr. Patterson's occupation when you first discussed this doll problem with him?

A. What doll problem?

Q. The matter of manufacturing the dolls that your wife had designed.

A. He was a salesman for Keyston Bros., leather goods.

Q. Did he represent any other organization in a

(Testimony of Maurice Juster.)

selling capacity? I believe you said he was selling for Hinz and Kerr, did you not?

A. Oh, yes, he sold their undressed dolls and the Keyston line. How many others he has—he had then, I don't know.

Q. What was the Keyston line?

A. It is cowboy suits and Indian suits, satchels and leather goods.

Q. Did you know whether or not he had at any time sold "Nancy Ann" dolls? A. Oh, yes.

Q. Did he ever discuss that experience with you?

A. No.

Q. Did he ever tell you anything about it?

A. Not until after he was working for us.

Q. What did he say with respect to the kind of dolls that seemed most popular? [80]

A. He said a nun doll was very popular, so we made a nun doll.

Q. Did he specify any other kind that were regarded as preferable? A. Bride.

Q. Any others?

A. He thought the short skirts would sell very well. He was wrong there.

Q. How long did you continue to turn out the line of short skirt dolls that you began with?

A. All of '47, and we kept some of the short dresses and had long dresses in 1948.

Q. Where did you secure the doll bodies which your organization dressed and sold?

A. From Kerr & Hinz Doll Company.

(Testimony of Maurice Juster.)

Q. And they were sold to you by Mr. Patterson?
A. That is right.

Q. Whose suggestion was it that you meet Mr. Hinz and Mr. Kerr in regard to the further capitalizing of your doll company?

A. Well, it was Mr. Patterson who wanted to put some money in, but I didn't like his proposition.

Q. Will you tell us just briefly the circumstances that led up to your introduction to Mr. Hinz and Mr. Kerr?

A. Well, I can't recall the exact date I met Mr. Hinz and Mr. [81] Kerr. I know it was a matter of taking—just taking a ride down the Peninsula with Mr. Patterson to look through the doll factory to find out how the dolls were made. We found it very enlightening, but that's all.

Q. Prior to your trip down to the Hinz and Kerr plant, had there been any discussion of your forming a partnership with Mr. Patterson?
A. No.

Q. Is it not the fact that Mr. Patterson had proposed to you that he finance you in your further activities?

A. That's right, he wanted to and I said after—after I heard him out I said no.

Q. In other words——

A. Then he had a counter proposal.

Q. In other words, there was a discussion of the possibility there and you declined the proposal that he made?

A. No. At first he had a proposal on his own; he wanted to be—he wanted to supply the capital for

(Testimony of Maurice Juster.)

a full fifty per cent interest and I turned him down. Then he suggested—told me that we couldn't go on the way we were undercapitalized and he would like to take me down again at least to see Mr. Kerr and Hinz to see if some agreement could not be made about getting together.

Q. This is early in 1948, was it not?

A. Yes. [82]

Q. Along about the time of the Toy Fair or shortly after?

A. Very shortly after; the week following.

Q. Was there a question of the ability of your organization to fill orders that brought the question up at that time?

A. That is right. I told him he had booked so much business for us that we needed capital to fill them, to expand.

Q. And at that time what was the state of your account with Hinz and Kerr?

A. Current, or almost so.

Q. In your subsequent arrangement with Mr. Hinz and Mr. Kerr, wasn't there a matter of a delinquency in your account that was taken into account?

A. Yes; to fill all those orders that Mr. Patterson wrote, why, I had to go in the hole to Kerr and Hinz.

Q. Were there further financial obligations facing you that rather—

A. No, everything else was current. The only money I owed was Kerr and Hinz.

Q. You say that Mr. Patterson proposed an ar-

(Testimony of Maurice Juster.)

Q. And they were sold to you by Mr. Patterson?
A. That is right.

Q. Whose suggestion was it that you meet Mr. Hinz and Mr. Kerr in regard to the further capitalizing of your doll company?

A. Well, it was Mr. Patterson who wanted to put some money in, but I didn't like his proposition.

Q. Will you tell us just briefly the circumstances that led up to your introduction to Mr. Hinz and Mr. Kerr?

A. Well, I can't recall the exact date I met Mr. Hinz and Mr. [81] Kerr. I know it was a matter of taking—just taking a ride down the Peninsula with Mr. Patterson to look through the doll factory to find out how the dolls were made. We found it very enlightening, but that's all.

Q. Prior to your trip down to the Hinz and Kerr plant, had there been any discussion of your forming a partnership with Mr. Patterson?
A. No.

Q. Is it not the fact that Mr. Patterson had proposed to you that he finance you in your further activities?

A. That's right, he wanted to and I said after—after I heard him out I said no.

Q. In other words—

A. Then he had a counter proposal.

Q. In other words, there was a discussion of the possibility there and you declined the proposal that he made?

A. No. At first he had a proposal on his own; he wanted to be—he wanted to supply the capital for

(Testimony of Maurice Juster.)

a full fifty per cent interest and I turned him down. Then he suggested—told me that we couldn't go on the way we were undercapitalized and he would like to take me down again at least to see Mr. Kerr and Hinz to see if some agreement could not be made about getting together.

Q. This is early in 1948, was it not?

A. Yes. [82]

Q. Along about the time of the Toy Fair or shortly after?

A. Very shortly after; the week following.

Q. Was there a question of the ability of your organization to fill orders that brought the question up at that time?

A. That is right. I told him he had booked so much business for us that we needed capital to fill them, to expand.

Q. And at that time what was the state of your account with Hinz and Kerr?

A. Current, or almost so.

Q. In your subsequent arrangement with Mr. Hinz and Mr. Kerr, wasn't there a matter of a delinquency in your account that was taken into account?

A. Yes; to fill all those orders that Mr. Patterson wrote, why, I had to go in the hole to Kerr and Hinz.

Q. Were there further financial obligations facing you that rather—

A. No, everything else was current. The only money I owed was Kerr and Hinz.

Q. You say that Mr. Patterson proposed an ar-

(Testimony of Maurice Juster.)

arrangement by which he would share fifty-fifty with you? A. That's right.

Q. What arrangement did you make with Mr. Kerr and Mr. Hinz?

A. Well, it was essentially the same; only it was differently put. At least I had some say in the matter with Mr. Kerr and Mr. Hinz, whereas with Patterson I didn't have anything to say. [83]

Q. I believe in your partnership arrangement there were three partners, yourself, Mrs. Juster and Mr. Mollison. A. That's right.

Q. And you shared equally a third each in the partnership? A. That is right.

Q. What was the arrangement that was made with Mr. Hinz and Mr. Kerr? What shares did you and your wife and Mr. Mollison retain in the business?

A. The original agreement was ten shares each for Mr. Mollison, Elise and I, and fifteen shares for Mr. Kerr and fifteen shares for Mr. Hinz. That was the original.

Q. Was that modified before it was put into effect?

A. What do you mean, before it was put in effect?

Q. Do you say that was the original——

A. Since there has been changes made, yes, Mr. Hinz and Mr. Kerr have put in additional capital.

Q. What are the present relative holdings of Mr. Hinz, Mr. Kerr and yourself and Mr. Mollison and Mrs. Juster?

(Testimony of Maurice Juster.)

A. Mr. Mollison, Elise and myself still have ten shares each. Mr. Kerr has 28, and Mr. Hinz has 32.

Q. I will direct your attention to the deposition which was taken on Friday, July 20, 1950, in the present proceeding, and referring especially to page 21 beginning line 20, will you take a look at it (handing deposition to witness)?

A. Line 20? [84]

The Court: For the purpose of reading that, he is going to examine you on it. You may read it.

A. I remember this.

Mr. Orr: At the point indicated in the record, the report says:

“Q. With reference to a meeting between yourself and Mr. Kerr, what were the circumstances that led to that meeting?”

And in answer to that you said:

“Well, Mr. Patterson was beginning to sell a lot of our dolls; in fact, he sold a lot at the 1948 Toy Fair, and he was calling me up from New York and was asking me if I could step up production. He was calling every other day from New York, telling us how the dolls were selling and asking whether I could make deliveries, and I told him that we were pressed for money and that I didn't know; we were doing the best job that we possibly could under the circumstances, working out of an apartment. So I told him I had been to a couple of banks to try and get a loan, but the banks had turned

(Testimony of Maurice Juser.)

arrangement by which he would share fifty-fifty with you? A. That's right.

Q. What arrangement did you make with Mr. Kerr and Mr. Hinz?

A. Well, it was essentially the same; only it was differently put. At least I had some say in the matter with Mr. Kerr and Mr. Hinz, whereas with Patterson I didn't have anything to say. [83]

Q. I believe in your partnership arrangement there were three partners, yourself, Mrs. Juster and Mr. Mollison. A. That's right.

Q. And you shared equally a third each in the partnership? A. That is right.

Q. What was the arrangement that was made with Mr. Hinz and Mr. Kerr? What shares did you and your wife and Mr. Mollison retain in the business?

A. The original agreement was ten shares each for Mr. Mollison, Elise and I, and fifteen shares for Mr. Kerr and fifteen shares for Mr. Hinz. That was the original.

Q. Was that modified before it was put into effect?

A. What do you mean, before it was put into effect?

Q. Do you say that was the original—

A. Since there has been changes made, Mr. Hinz and Mr. Kerr have put in a new agreement.

Q. What are the present relations between Mr. Hinz, Mr. Kerr and yourself and Mrs. Juster?

(Testimony of Maurice Oster.)

A. Mr. Mollison, Eli and myself still have ten shares each. Mr. Kerr has 28, and Mr. Hinz has 32.

Q. I will direct your attention to the deposition which was taken on Friday, July 20, 1950, in the present proceeding, and referring especially to page 21 beginning line 20, will you take a look at it (handing deposition to witness)?

A. Line 20? [84]

The Court: For the purpose of reading that, he is going to examine you on it. You may read it.

A. I remember this.

Mr. Orr: At the point indicated in the record, the report says:

“Q. With reference to a meeting between yourself and Mr. Kerr, what were the circumstances that led to that meeting?”

And in answer to that you said:

“Well, Mr. Patterson was beginning to sell a lot of our dolls; in fact, he sold a lot at the 1948 Toy Fair, and he was calling me up from New York and was asking me if I could step up production. He was on every other day from New York. I saw how the dolls were selling. I thought, ‘If I could only make more,’ and I could not. I was pressed for time. I was doing a lot of work. I was doing a lot of work under the

(Testimony of Maurice Juster.)

me down and said they couldn't possibly do it, and he said, "Hold everything until the Fair is over," and he flew out here immediately upon the Fair closing, and I went down to his apartment and he laid out a proposition before me. In fact, he had hinted over the phone that he would like—he [85] asked me over the phone how I would like him as a partner, and I said fine, because I knew he was in a position to help us a great deal financially as well as a representative. When he got back here I went down to the apartment. I didn't like his proposition at all; he wanted too much. He said that we were only going to exhaust ourselves trying to pull ourselves up by our bootstraps; that we absolutely had to have help if we wanted to continue to exist. He said he had another proposition. He wanted me to meet Mr. Kerr and Mr. Hinz, and a day or so following, why, he brought us down to Santa Clara and we started talking back and forth. Of course, we owed Kerr and Hinz some money, and we started talking back and forth and we made an arrangement to form a corporation."

Do you recall giving that testimony?

A. Yes, sir.

Q. And that testimony is substantially in accord with the facts as you recall them? A. Yes.

Q. In your statement there that you knew that Mr. Patterson could be of substantial help to you,

(Testimony of Maurice Juster.)

what induced that thought in your mind? Did you know whether he was financially able to help you?

A. Yes, I knew that, and I also knew that he was a very successful sales representative. [86]

Q. Were you aware that he had been quite successful in selling the "Nancy Ann" dolls?

A. I was aware of that.

The Court: Selling what?

Mr. Orr: "Nancy Ann" dolls.

Q. Do you recall how long he represented the "Nancy Ann" Company in selling dolls?

A. No, I still don't know how long he worked for the "Nancy Ann" Doll Company.

Q. Following the arrangement that you made with Mr. Hinz and Mr. Kerr, what, if any, participation did Mr. Patterson have in the business?

A. In our business or their business?

Q. Both or either.

A. As far as I know, all he had was he was their sales representative and he was the sales representative for us, too.

Q. In fact, he had been selling the dolls for you before the arrangement was made?

A. Oh, no. He sold dolls for Kerr and Hinz first before he ever started selling dolls for us.

Q. But he had been selling for you as a partnership before the corporation was formed?

A. That's right.

Q. And then following the formation of the corporation, he still continued as a salesman for the organization? [87]

(Testimony of Maurice Juster.)

A. That's right, up until the end of '49.

Q. Now, in determining the policy of the partnership, did you take an active part?

A. In the partnership?

Q. In the partnership. A. Oh, yes.

Q. How did you determine the policy as between yourself and Mrs. Juster and Mr. Mollison?

A. Mr. Mollison had nothing to do in the business at all. He trusted his sister and myself to do the best job we could.

Q. Then it was largely a matter of agreement between yourself and Mrs. Juster as to what was to be done?

A. That's right. If came in and I didn't like the way one girl was dressing a doll, I didn't tell the girl; she told the girl.

Q. With reference to the sales of your product, who determined which dolls were to be continued in the line and which ones were to be dropped?

A. That is a very simple matter. Whenever you have a dud, you drop it. That is in every business. Mr. Orr, when a thing doesn't sell, you just let it go.

Q. In determining between yourselves which were the duds and which were the ones that might make good——

A. Your sales told you that. If you didn't sell, you just didn't make it any more, that's all. [88]

Q. Did you ever discuss the sales of any of your doll products with Mr. Patterson?

(Testimony of Maurice Juster.)

A. Why, sure.

Q. And did he ever have any suggestions to make as to which dolls should be continued and which ones should be dropped?

A. Yes, he would tell me that certain things weren't selling, and don't make them any more for our own good. Naturally I followed his expert advice.

Q. And at times did he also suggest certain types of dolls that he thought would sell readily?

A. Yes, he said a nun would be a good number to add to our line.

Q. And other dolls as well, at his suggestion?

A. What do you mean, "other dolls"?

Q. Others than the nun; that isn't the only one he suggested?

A. Of course that is the missus' job, is to create new numbers.

Q. At his suggestion, you did add additional numbers to your line?

A. We added the nun and the bride to our line on his suggestion.

Q. Are those the only two?

A. I don't know how many others.

Q. There were others?

A. There may not have been. [89]

Q. There may have been many?

A. No, I won't say many, I don't think.

Q. Several, I will say.

A. He didn't tell us how many numbers to put in the line and he didn't tell us how many not to

(Testimony of Maurice Juster.)

carry. I am only trying to help you.

Q. I am only asking what his participation was. Did he make any suggestions along that line?

A. Not too many.

Q. But he did make some?

A. He made a few.

Q. And some you accepted?

A. Some we accepted. Those we felt we should accept we accepted.

Q. After your organization became incorporated, who determined the policy of the company?

A. On policy matters there was a meeting.

Q. And who would attend that meeting?

A. Mr. Kerr, Mr. Hinz, Elise and myself.

Q. At any time did your sales representatives attend those meetings?

A. There was once that Mr. Patterson and Mr. Kahn were present at such a policy meeting.

Q. Did Mr. Patterson and your other salesmen keep in touch with you with regard to the trends of the market and the types [90] of dolls that would be demanded? A. Yes.

Q. And would you have that information available at the time you had your directors' policy-forming meetings? A. Yes.

Q. And in determining policy, were the recommendations of your salesmen taken into account?

A. They were considered.

Q. Did Mr. Patterson have any financial interest other than as a sales representative in the Dollcraft Co.? A. None.

(Testimony of Maurice Juster.)

Q. Either before or after the incorporation?

A. Before or after.

Q. Has he any connection with it at the present time? A. No.

Q. How long since he has represented the company in a sales capacity?

A. Since the end of 1948.

Q. Now, as I recall your testimony, you started out with a group of dolls which were given the names of little girls? A. Yes.

Q. And that line of dolls was continued for a substantial length of time?

A. It was continued until the end of '46, all of '47 and part of '48—part of the numbers were '48, all of '48. [91]

Q. And are some of them still in the line?

A. No, some of them—the balance of the short dresses were discontinued as of the beginning of this year. We ran some of them through up until the beginning of this year. We felt they had had their run.

Q. They were available most of '49?

A. Yes.

Q. The next group you added, as I recall, was the group of foreign costume dolls? A. Yes.

Q. And they were twelve in number, twelve different styles?

A. Well, there was twelve countries.

Q. Twelve styles in that group?

A. That is 24 styles, twelve boys and twelve girls.

(Testimony of Maurice Juster.)

Q. You had pairs? A. Yes.

Q. Then how long was it after you had put out your line of foreign costumed dolls that you began the series of "Who Am I?" dolls?

A. We brought out the "Who Am I Series" in the beginning of 1948.

Q. At that time, in the beginning of 1948, I believe you stated that they were boxed and put out in the manner exemplified by the several exhibits offered here this morning? A. Yes. [92]

The Court: We will take a recess until counsel finds his doll.

(Recess.)

Mr. Orr: I will direct your attention to an exhibit, Plaintiff's Exhibit 18, which is identified as "Who Am I? No. 204" and ask, does that represent the form in which you put out the "Who Am I Series" of dolls? A. Yes.

Q. Did you put out those dolls in more than one size? A. In 1948, no.

Q. When you first began putting them out in '47, I believe you stated——

A. 1946. They were all one size, seven inch bisque dolls.

Q. When was it you said you began putting out the "Who Am I Series"?

A. You are talking about the size of the doll?

Q. No, the series, "Who Am I?"

A. The series in 1948.

Q. That was in 1948? A. Yes.

(Testimony of Maurice Juster.)

Q. Could you fix about the month?

A. Yes, about February—January or February.

Q. As you first put them out at that time, and in the early part of 1948, you did not apply to the doll or to the box the mark to identify the character that is supposed to be depicted [93] by the contents of the box? A. No.

Q. It appeared neither on the box nor on the doll? A. No.

Q. Is that true with respect to the whole line of "Who Am I?" dolls?

A. That was true of all the "Who Am I?" dolls.

Q. These little blue circulars that are identified here as Plaintiff's Exhibit 20 were inserted as inserts in the boxes of dolls sold at that time, were they not? A. Yes, they were.

Q. In the little blue circulars of the dolls we are referring to, were those listed under "Fairyl-land Series"? A. Yes.

Q. And in the listing there was no designation of name following the numbers 201, 202 up to 208?

A. That is right.

Q. And referring now to the invoice and price sheet, Plaintiff's Exhibit 26, directed to DeMet's, Inc., of Chicago, does that indicate the listing which you made on your price lists and order sheets at that time? A. That is right.

Q. That was during the early part of '48?

A. That is right.

Q. And no name was included in any of the items of the "Who [94] Am I Series"?

(Testimony of Maurice Juster.)

A. That is right.

Q. Whose idea was it to add the "Who Am I Series" to your line of dolls? A. Elise's.

Q. And have you any information as to where the idea sprung from, where she struck upon that?

A. Probably reading fairy tales to Bonnie. Bonnie is my daughter, the oldest one.

Q. Do you know whether the matter might have been suggested by Mr. Patterson?

A. I don't know. We very seldom saw Mr. Patterson; he was on the road.

Q. As far as you know, it could have been suggested by Mr. Patterson?

A. Let me finish, Mr. Orr. You understand that he was only a sales representative of ours and that we saw him very seldom. He was on the road at least eight or nine months of the year, and then during the summer he would take a two months' vacation, and during the Christmas holidays he would take another vacation, so we didn't see him very often.

Q. He did keep in touch with your organization, however, didn't he?

A. Oh, yes, many a time. If it was only over the phone to find out how we were getting along. In fact, he never saw the [95] 1948 line until it was all designed. I think the nun suggestion that he gave me came over the phone. He says, "I think you ought to have a nun."

Q. The "Who Am I Series" was first introduced in 1948, was it not? A. Yes.

(Testimony of Maurice Juster.)

Q. And can you state positively that it was not Mr. Patterson's suggestion that you add the "Who Am I Series"?

A. No, I won't be pinned down like that.

Q. You couldn't say that he didn't make the suggestion?

A. No, I won't say that he didn't; I won't say that he did—he did or he didn't.

Q. Mr. Patterson was representing you as a sales representative at the time you first put the "Who Am I Series" out, was he not?

A. Yes.

Q. How long was it after you first displayed these dolls without the names, the dolls of the series "Who Am I?," was it before you began to apply the name to the containers?

A. I believe it was September of '48; it could possibly be a little later.

Q. That would be after the corporation was formed? A. Yes, sir.

Q. Whose suggestion was it that the names be applied to the boxes? [96]

A. The suggestion first came from our customers, and the salesmen, Mr. Kahn in particular was hounding me for months to do it.

Q. Which salesman was that?

A. Mr. Kahn—Mr. Larry Kahn.

Q. Did Mr. Patterson also make the suggestion?

A. No; that I know definitely.

Q. You say the suggestion came from your customers. Why was that?

(Testimony of Maurice Juster.)

A. Well, they wanted the dolls identified by name along with the number.

Q. Was that because of difficulty encountered in identifying the dolls with the characters that they are supposed to depict?

A. No, no, it was encountered in difficulty when they were stacked on the shelves, so it would be very easy, instead of trying to remember eight characters by the numbers, if the salesgirl just saw the name there, she could pick it right out of the shelf amongst the stack of boxes.

Q. How about when the customers came into the stores?

A. I think we sold enough——

Q. Was it to facilitate their selection of dolls?

A. I think we sold enough of those without any identification to prove that they recognized the characters that they were supposed to depict. The mere fact that we got lots of reorders on them I think proved that they recognized the [97] characters, Mr. Orr.

Q. Now, I believe that you testified this morning that with respect to doll item No. 203, "Who Am I?," which is Exhibit 17, that you identified her as "Little Bo-Peep," largely because of the shepherd's crook that she carries; is that right?

A. No, I said the panniers and the crook.

Q. And with respect to the doll No. 204, which has been identified here, I believe, as "Mistress Mary."

A. That's right.

(Testimony of Maurice Juster.)

Q. The identifying characteristic there is the flower in the hand?

A. The flower in the hand and also we carried the flower into her dress.

Q. Now, the flower dress, would that suggest then that perhaps this young lady is also "Mistress Mary"?

A. No. Her pattern is more of a checked pattern.

Q. Those little figures you do not call flowers?

A. That is a figure that you would recognize as a bowl, Mr. Orr, not a flower.

Q. Is "Mistress Mary" the only one in which you used a pattern design?

A. Oh, no; you are limited to what you can buy.

Q. That reminds me: What was the material shortage that you encountered in the early days when you first got back from the service? What material did you find especially short? [98]

A. Well, taffetas and satins were on the black market. One man particularly told me that "This isn't worth it, but that is what you are going to have to pay if you want it." That was in 1947. And also the wholesale houses, a lot of wholesale houses, jobbers in San Francisco, did not have print material. You could buy it retail cheaper than you could buy it wholesale, and a lot of materials were bought that way.

Q. Among the materials which were included in the costuming of this doll, Plaintiff's Exhibit 27, which is one of the foreign dolls, which of the materials were there on the shortage list that you

(Testimony of Maurice Juster.)

complained of? A. The cotton gabardine.

Q. Along with silks and satins?

A. And you know how I got that?

Q. When did you get it, is more important.

A. I got in '47, and I got it through a manufacturer that was a friend of mine.

Q. Referring now to Plaintiff's Exhibit 45, which is a price list order blank for Dollcraft Co., will you state when that was put into use?

A. I think we had those printed just in time for the Toy Fair of 1949, I am pretty sure.

Q. At that time were you putting out any of your dolls in the glass containers?

A. No. [99]

Q. When you adopted the various means which have been included in the list of "Fairyland Series" dolls, Nos. 201 to 212, as shown by Exhibit No. 45, did you make any investigation as to whether the marks had been in use by others or use on doll products? A. I believe Mr. Hinz did.

Q. What investigation was made?

A. What?

Q. What investigation was made?

A. Oh, I don't know the workings of that.

Q. Before you made your arrangement with Mr. Hinz and Mr. Kerr and while you were operating as a partnership, you used a number of these names. Did you make any investigation before you began using them?

A. No, in partnership we made no investigation.

(Testimony of Maurice Juster.)

Q. At the time you began making the "Who Am I Series" which was put out without names, did you know that there were other manufacturers or another manufacturer that was marketing a "Red Riding Hood" doll? A. Yes.

Q. Did you know who that was? A. Yes.

Q. And who was it?

A. That Unique—not Unique; somebody back East made a very cute little doll dressed as Red Riding Hood, about a six-inch doll that sold for about \$3.95. [100]

Q. Did you know that the mark "Red Riding Hood" was registered as a trade-mark?

A. When I first saw that "Red Riding Hood" doll, I didn't know it, no, because that was in '47.

Q. When you began using the name "Little Miss Muffett," did you know that there was a registration for a trade-mark on that name?

A. We didn't use Miss Muffett in '47 or '48; we used "Who Am I?" We didn't use any names until after the incorporation, Mr. Orr.

Q. I see. You didn't apply any names until after the corporation was formed?

A. No; the only two we used as a partnership was "Hansel and Gretel," and that was that order that Mr. Patterson sold to Joseph Horn & Company, and I had a few left over that I gave to a little customer out on Balboa Street, and those were the only two in 1947 that had "Hansel and Gretel."

Q. You yourself did not participate in the making of any investigation with regard to the names

(Testimony of Maurice Juster.)

when you did decide to apply them to the dolls. is that correct? A. No, I didn't.

Q. I believe you said Mr. Hinz made it?

A. Yes.

Q. What part does Mr. Hinz take in the direction and management of the business of Dollcraft Co.? [101]

A. He doesn't take any management; he is in on policy making meetings.

Q. In the direction of policy?

A. That is right.

Q. And is that one of the matters that he attends to in behalf of the company, determining its policy on trade-marks? A. Legal, yes.

Q. In designing these dolls which have been identified here as "Who Am I Series," do you know where Mrs. Juster derived her ideas?

A. I guess from reading the stories. They are illustrated—so many of them are illustrated, and she probably leaves out features she doesn't like and adds features that would add to the attractiveness of the doll.

Q. In following up this research that you say she had made with respect to the foreign costumes, did she engage in that same practice with respect to the "Little Lady Series"?

A. There was no research on the "Little Lady Series"; but on the foreign dolls there were little things she had to leave off because otherwise you

(Testimony of Maurice Juster.)

would have had to price your dolls off the market. The detail was too great.

Q. In designing these dolls which ultimately became identified in the "Who Am I Series" as, say, "Red Riding Hood," do you know the source of the material from which Mrs. Juster derived her ideas for that costume? [102]

A. Probably any fairy tale or story book.

Q. How about the "Little Bo-Peep"? Do you know the source of that? A. The same way.

Q. You referred this morning to a booklet, Plaintiff's Exhibit 24, entitled "Hansel and Gretel."

A. Yes.

Q. Is that one of the reference books that Mrs. Juster referred to in designing any of her dolls?

A. This particular book was submitted to my wife by Joseph Horn; this is to copy as nearly as possible "Hansel and Gretel," because they were putting on a big store-wide promotion of "Hansel and Gretel," and they wanted the dolls dressed as near that as they could get it, and the samples we submitted met with their approval and they gave us the order.

Q. And in designing them the intent was to copy the figures as nearly as possible, is that correct? A. Yes.

Q. And this doll "Hansel"—

A. No, that is "Gretel"; "Hansel" is the boy.

Q. "Gretel," who is "Who Am I No. 208," is that the "Gretel" which you designed from that order? A. That is right.

(Testimony of Maurice Juster.)

Q. That was designed from the booklet which was submitted to you? [103] A. Yes.

Q. What was the name of that company that submitted it? A. Joseph Horn Company.

Q. I will direct your attention to the title page of the booklet, "Hansel and Gretel," Plaintiff's Exhibit 24, midway below the middle of the page the language, "Designed and produced by Spring House, Springfield, Massachusetts; copyright 1946 by Spring House, all rights reserved, including the right of reproduction in whole or in part in any form." Were you aware of that?

A. I take that——

Mr. Mellin: Just a moment. If your Honor please, he is not now charging the witness with infringing the copyright on behalf of somebody that isn't in court; I mean, that question is so far beyond the issues of this case, your Honor, that it is ridiculous.

Mr. Orr: If your Honor please, it illustrates the willingness of this organization to utilize the copyrighted material of other owners without regard to their property rights.

The Court: Are the other owners complaining?

Mr. Orr: The other owners are not complaining, so far as I know.

The Court: It has no place here then.

Mr. Mellin: As a matter of fact, if he let the witness compare the dolls, the witness would show certain characteristics [104] familiar to all Hansels

(Testimony of Maurice Juster.)

and Gretels, but not an exact duplicate of the book.

Q. (By Mr. Orr): Comparing now the doll, Plaintiff's Exhibit No. 23, with the picture of the little girl on the cover of the book, "Hansel and Gretel," Exhibit 24, will you please point out the essential differences that you find in those costumes?

A. Yes; on the booklet here she has puffed sleeves. She has a patch on her dress in the booklet. There is none on the dress. There is a patch on the boy's pants and so do we have a patch on the boy's pants, but not on his jacket. Colors have been changed, too, on his outfit.

The Court: Who made that objection?

Mr. Orr: I suggest, your Honor compare for yourself the costume of the young lady in the box and the young lady on the cover.

The Court: Assuming that he copied this, then where do we find ourselves?

Mr. Orr: Right where we are.

Mr. Mellin: We find ourselves in this position, your Honor: that because his "Hansel and Gretel," a storybook of a different kind, the plaintiff contends they have a monopoly on the use of Hansel and Gretel.

Mr. Orr: On the contrary, we never claimed exclusive rights in the name "Hansel" or "Gretel." They have been used [105] by "Nancy Ann" for a couple of years, but they have also been used by others.

Mr. Mellin: We will show that the others are shown to be of like appropriation of something that

(Testimony of Maurice Juster.)

doesn't belong to the defendant, and by their own admission.

Mr. Orr: I mentioned it in passing merely to indicate the willingness to trespass upon the property rights of others just as they have trespassed upon the rights of the "Nancy Ann" doll in appropriating their trade-marks and using them, so have they trespassed upon the copyrights of other manufacturers of material and of an exclusive right of reproduction in materials of certain figures that are copyrighted. I might mention at this time that a copyright is merely another matter of protecting property of this general character.

Q. Did you include in your first group of "Who Am I?" dolls the doll whom you intended to depict as "Alice in Wonderland"?

A. The copy of "Alice in Wonderland" was my own copy of "Alice in Wonderland." That wasn't too good on illustrations. All we could go by was her general little apron and the fact that she had blond hair.

Q. Was "Alice in Wonderland" included in the first group? A. Yes.

Q. That you made while you were still in partnership? A. Yes. [106]

Q. And among those that were put out without a designated name?

A. That is right. Is that registered, Mr. Orr?

Q. I was going to ask, did you make any in-

(Testimony of Maurice Juster.)

vestigation as to whether that name had been in use by others?

A. That, as I say, Mr. Hinz made all investigations on that order.

Q. This was before Mr. Hinz was in the picture, while you were operating as a partnership?

A. We didn't use any names.

Q. Oh, I see. So you didn't put a name on and make no investigation as to whether it had been used by others? A. No.

Q. And that first group of dolls that you put out without any designating information, were you aware that any of them had been used by the Nancy Ann organization for dolls?

A. Without names?

Q. In the group that you put out without names.

A. Yes.

Q. The "Who Am I Series"? A. Yes.

Q. Were you aware that the characters which you depicted by those dolls or intended to depict by them had been made the subject of trade-mark registrations of the Nancy Ann organization? [107]

A. Yes.

Q. You were aware of that. Was that one of the reasons that you avoided applying the name to the box or to the doll?

A. No. If I wanted to put the name on, I would have done it, just like some of the other doll companies did.

Q. And just as your company ultimately did?

A. There were—as I told you before, Mr. Orr, they were only brought about by the inquiries and

(Testimony of Maurice Juster.)

the requests of our customers to do so. We finally gave in.

Q. Referring to the advertisement which was published by Macy's, identified here as Plaintiff's Exhibit 46, will you state whether or not you find a designation of the dolls that are to be sold under that advertisement?

Mr. Mellin: Will you read the question?

(Question read.)

A. Yes.

Q. (By Mr. Orr): What is the designation?

A. "Red Riding Hood," "Little Bo-Peep," and "Sugar and Spice."

Q. Do you also find a designation in large type what the ad relates to?

A. The exclusive bisque story dolls. Can I add something?

Q. Yes. A. We did not write the ad.

Q. The ad was published with reference to dolls supplied by your company, was it not? [108]

A. Yes, but we don't pay for any advertising, Mr. Orr.

Q. How long before the publication of this advertisement was it that you sold the dolls to Macy's that are advertised in this particular issue of the paper?

A. If you will let me see the order, the invoice——

The Court: About a week, as I recall it, wasn't it?

A. About a week, yes, sir. Just about a week

(Testimony of Maurice Juster.)

from the time we shipped them until the ad appeared.

Q. (By Mr. Orr): And how long was it after the publication that the dolls were returned to you for credit?

A. Quite a while, I seem to recall. Look down here. There was a discrepancy from the time this sheet was made out until I received it and until a credit was made out.

Q. What was that?

A. Eighteen days—but it was in there some time.

Q. Were any other of the dolls which you sold to Macy's other than those included in this advertisement returned to you by Macy's?

A. No. All—yes, all the dolls under glass that were sold them were returned; all those that were not sold in the box.

Q. All under glass belonged to that same series, did they not?

A. Yes, but they are not all "Fairyland Series."

Q. What dolls are under glass other than those listed in your—— [109]

A. There are some of our "Glamor Series" and there is a bride, the "Romance and History Series."

Q. How many do you have under glass altogether?

A. Twelve numbers.

Q. Are eight of the "Fairyland Series"?

A. Oh, no, there is four "Fairyland" out of twelve.

Q. The others are cellophane as in this type, is that right?

A. That is right.

(Testimony of Maurice Juster.)

Q. Did the order to Macy's include any under cellophane? A. No.

Q. All under glass? A. Yes.

Q. This morning the correspondence, notices of infringement to certain customers, were put into evidence, including Macy's, Cliff House Gift Shop, and Victor Market.

A. Yes, and West Coast Five and Ten.

Q. West Coast Five and Ten. Do you know of any other customers of yours who received notices of infringement?

A. I don't know of any. The only ones I know of are those that were called to our attention.

Q. And you know of no other notices?

A. I don't know of any, no.

Q. Were any of your doll products sold prior to the time of these notices returned to you by any customer who, so far as you know, has not received a notice of infringement from the [110] Nancy Ann Company? A. No.

Q. No returns from any other customers?

Mr. Mellin: What was the answer?

Mr. Orr: The answer is "No."

There are no further questions at this time.

Redirect Examination

By Mr. Mellin:

Q. Mr. Juster, with respect to the "Fairylend Series" that have character names on the dolls which they portray, which of the doll exhibits 30 to 42, that is, the "Fairylend" dolls, each portrays a named character in nursery rhymes or story books,

(Testimony of Maurice Juster.)

isn't that a fact? A. That is right.

Q. And has such characteristics of those characters which it portrays as are found in story books and nursery rhymes? A. That is right.

Mr. Mellin: No further questions.

Recross-Examination

By Mr. Orr:

That makes it necessary for me to ask one further question.

Q. With reference to the doll that you have identified here as Plaintiff's Exhibit 37 and which bears the designation "Sugar and Spice," will you please tell me what nursery rhyme character that doll portrayed?

A. Being as I interpret it, I know that it happens to be [111] "Sugar and Spice."

Q. Is that a nursery rhyme character?

A. It is only a little rhyme, and about the only thing anybody can do with a two-line rhyme is to give their conception of something dainty, something sweet, and so they picked out something pink or blue. And that is her idea of something nice, sugar and spice.

Q. And that doesn't represent any particular character from nursery rhymes or fairyland, is that correct?

The Court: Sugar and spice makes everything nice. I think when I was a youngster I heard it.

Q. (By Mr. Orr): But what I mean is that this is not a character of fiction, as we will say

(Testimony of Maurice Juster.)

“Little Miss Muffett” or “Little Bo-Peep” are?

A. No; neither is “Alice in Wonderland.”

Q. What characteristic is there about her to designate any particular character from the nursery rhymes? A. The way she is dressed.

Q. If she isn’t a character, what characteristic indicates that character? In other words, she isn’t a character from fiction.

A. Well, let me put it this way: If she was to put in a very thin character out of a fairy tale, you can’t very well go ahead and make a doll very thin.

Q. Did you ever hear of a character in nursery rhymes called [112] “Sugar and Spice”?

A. I have read it, yes.

Q. I asked you if you ever heard of the character called that? A. No.

Q. Did you know at the time you adopted the name “Sugar and Spice” that the name had been registered as a trade-mark by the Nancy Ann organization? A. Maybe I had.

Mr. Orr: No further questions.

Mr. Mellin: Mr. Orr, may Mr. Juster be excused, if counsel is through with him, because there is no one down there to run the plant; his wife is ill. There are only the two of them. Are you going to have any further use for him?

Mr. Orr: I would rather have him remain here until we complete tomorrow’s proceeding. Some of the information Mr. Hinz is supposed to have could have been easily available to Mr. Juster and I may

want to question him a little bit more on that.

Mr. Mellin: Are you going to recess now or shall I commence a new witness?

The Court: You live in Oakland?

Mr. Mellin: Alameda; yes, your Honor.

The Court: All right. We will take an adjournment until 10:00 o'clock tomorrow morning.

(Thereupon an adjournment was taken to tomorrow, Tuesday, August 22, 1950, at 10:00 o'clock a.m.) [113]

Tuesday, August 22, 1950—10:00 A.M.

The Clerk: The case of Dollcraft Co., Inc., v. Nancy Ann Storybook Dolls, for further trial.

Mr. Mellin: Ready, your Honor.

The Court: Proceed.

Mr. Orr: There are just a few further questions I would like to ask Mr. Juster, with leave of Court, rather than interrupt the continuity of his testimony. It might be well to proceed at this time with counsel's consent.

Mr. Mellin: If it is proper cross-examination, your Honor, I guess I have no objection.

Mr. Orr: Mr. Juster, will you take the stand?

MAURICE JUSTER

recalled to the stand.

Recross-Examination

(Continued)

By Mr. Orr:

Q. I am not sure that it was made clear yester-

day, but Mr. Patterson represented you at the Toy Fair in New York in 1947, did he not?

A. No, sir, he did not.

Q. I will call your attention to the deposition taken on Friday, January 20, 1950, referring to pages 20 and 21, beginning at line 23. In answer to a question, your answer was:

“Wait a minute—wait a minute—wait a minute. I am getting my years all mixed up here. Yes, wait a second. In 1947 I was still selling the dolls, and Mr. Patterson’s [114] daughter represented us on the Coast here and Mr. Patterson didn’t take the dolls to New York until 1948, the 1948 Toy Fair, and the 19—gosh! No, I am all mixed up—By Jingo! He did; he took it in ’47 and ’48; that’s right—yes, he did. It’s ancient history now.”

Do you recall making that answer?

A. I guess so. If I said it, then I am confused again.

Q. Is your recollection now different than it was when you gave that deposition?

A. No; I guess you have me confused, Mr. Orr. I can’t recall. I definitely know that he had them in ’48, but I can’t recall whether he did in ’47. I know he did sell some dolls for us in ’47, but I seem to think it was later on in the year.

Q. You do recall, however, definitely that he was representing you at the time you brought out your line of “Who Am I?” dolls? A. Yes.

Q. It was Mr. Patterson who introduced you to Mr. Kerr and Mr. Hinz, isn’t that so?

(Testimony of Maurice Juster.)

Mr. Mellin: If your Honor please, I do not object to further cross-examination, but we are going over exactly the same ground as we went over yesterday and it seems to be a duplication. He asked him yesterday about Mr. Patterson introducing him to Mr. Hinz four times, because we almost objected yesterday to the repetition. Now we are going on again. [115]

Mr. Orr: I may have further questions as to the testimony that he gave yesterday.

Q. Did you answer?

A. Yes, I answered that, sir, that Mr. Patterson did introduce me to Mr. Kerr and Mr. Hinz.

Q. During the discussion with regard to the formation of a corporation, was there any discussion as to whether or not Mr. Patterson should participate in the organization?

A. I can't recall that, no; I don't know at the meetings the identical words.

Q. Do you have any recollection as to whether he considered coming into the corporation?

Mr. Mellin: How would this witness know whether Mr. Patterson considered coming into the corporation?

Mr. Orr: I am asking him if there was any discussion regarding that.

The Court: Was there any discussion had in that regard?

A. I don't know, your Honor; all I know is that the only time—the only time that I am sure that Mr. Patterson was interested was before the name

(Testimony of Maurice Juster.)

of Mr. Kerr and Mr. Hinz arose as to forming a corporation. That is the only time that I am sure that Mr. Patterson was interested.

Q. (By Mr. Orr): You have no further recollection as to whether it was ever discussed that he might participate in the [116] formation of the corporation? A. I just said no.

Q. Is Mr. Patterson still representing your organization in the sale of dolls?

A. I told you yesterday no.

Q. When did that employment terminate?

A. I told you that it had terminated at the end of 1948.

Q. And what was the reason for the termination, do you recall?

A. Mr. Patterson felt he could make more money with a different line, a line of plastic musical dolls out of Southern California.

Q. Going to another subject. You referred yesterday to the advertisement published by Macy's in the San Francisco paper. Do you know of any other advertisements of your doll products in that period from that time to Christmas, say?

A. No, sir, I don't know of any other advertisements.

Q. Also yesterday you identified certain orders which you received in which the dolls were designated by name rather than by number alone?

A. Yes, sir.

Q. Do you recall whether those orders were re-

(Testimony of Maurice Juster.)

ceived before or after you began applying the names to the boxes containing the dolls?

A. I will have to see the orders.

Mr. Orr: Exhibit 44 for one, and 44 or 45 (handing papers [117] to witness).

A. This was before we began applying the names on the boxes.

Q. How were the names of the individual dolls made known to them? A. Pardon me?

Q. Do you know how the names were made known to the people who ordered the dolls?

A. I go on the assumption that they recognized the name from the way the doll was dressed.

Q. You feel that the appearance of the doll was sufficient to enable the person making the order to identify the doll by its name? A. Yes.

Q. I will ask you to examine a specimen of doll which was identified in connection with the deposition of Mr. Rowland taken Wednesday, December 14, 1949, and identified therein as Exhibit 6, and ask you if looking at the doll but without examining the label which appears upon its wrist, you can tell me what character that doll represents.

A. I couldn't tell you.

Q. I will direct your attention to a second doll which was identified in connection with Mr. Rowland's deposition on December 14, 1949, as Exhibit 8 for identification, and ask you if you look at that doll without examining the wrist label on the doll, you can tell what character that represents. [118]

A. I can't identify that one either.

(Testimony of Maurice Juster.)

Mr. Mellin: These are Defendant's dolls, Nancy Ann dolls.

Mr. Orr: These are Nancy Ann dolls, produced in connection with the deposition of Mr. Rowland on December 14, 1949.

Q. I will direct your attention to another doll produced in connection with Mr. Rowland's deposition designated and identified therein as Exhibit 14, and ask you if you can determine from the appearance of that doll what character it represents or depicts? A. I can't tell you that one either.

Q. I will further direct your attention to a doll produced in connection with Mr. Rowland's deposition and identified therein as Exhibit 4, and ask if you can tell from the appearance of that doll what character it represents?

A. No, I can't tell you that one either.

Q. I direct your attention to another doll produced in connection with Mr. Rowland's deposition and identified therein as Exhibit 10, and ask you if you can tell me from the appearance of that doll what character it represents.

A. I can't tell you that one either.

Q. I direct your attention now to a doll produced in connection with Mr. Rowland's deposition identified therein as Exhibit 12, and I will ask you if you can tell from the appearance of that doll what character it represents?

A. I can't tell you that one either. [119]

Q. Directing your attention now to a doll produced in connection with Mr. Rowland's deposition

(Testimony of Maurice Juster.)

and identified therein as Exhibit 16, I will ask you if you can tell from the appearance of that doll what character it represents.

A. I can't tell you that either.

Q. I will direct your attention to another doll produced in connection with Mr. Rowland's deposition and identified therein as Exhibit 2, and ask you if you can identify what character that doll represents.

A. That one I can recognize. That is possibly "Red Riding Hood"; I think it is.

Mr. Orr: I would like at this time to offer in evidence the dolls which have just been shown to the witness. I will offer first the doll last referred to by the witness, which he said would probably be "Little Red Riding Hood," which doll was identified in the taking of Mr. Rowland's deposition as Exhibit 2, and I will ask that that be marked Defendant's Exhibit 1.

The Court: Let it be admitted.

Mr. Orr: By number or by letter, your Honor?

The Court: I leave it to the Clerk. He is responsible.

The Clerk: A.

(The doll referred to was thereupon marked Defendant's Exhibit A in evidence.)

Mr. Orr: I will next offer the doll identified in connection with the Rowland deposition as Exhibit 4 and ask that it [120] be placed in evidence here as Defendant's Exhibit A-1.

(Testimony of Maurice Juster.)

The Court: Let it be admitted and marked.

The Clerk: Defendant's Exhibit A-1 in evidence.

(The doll referred to was thereupon marked Defendant's Exhibit A-1 in evidence.)

Mr. Orr: I next offer the doll identified in Mr. Rowland's deposition as Exhibit 6 as Defendant's Exhibit A-2.

The Court: Let it be admitted.

(The doll referred to was thereupon marked Defendant's Exhibit A-2 in evidence.)

Mr. Orr: Let me state at this time that Exhibit A was, as Mr. Juster supposed, "Little Red Riding Hood." Exhibit A-1 is "Sugar and Spice," and Exhibit A-2 was "Little Bo-Peep."

I will now offer the doll identified in connection with Mr. Rowland's deposition as Exhibit 8, as Defendant's Exhibit A-3. The name of that doll is "Mistress Mary."

The Clerk: A-3 in evidence.

(The doll referred to was thereupon marked Defendant's Exhibit A-3 in evidence.)

Mr. Orr: I next offer the doll identified in connection with Mr. Rowland's deposition as Exhibit 10, in this proceeding as Defendant's Exhibit A-4. The name of the doll is "Curly Locks."

The Clerk: A-4. [121]

(Testimony of Maurice Juster.)

(The doll referred to was thereupon marked Defendant's Exhibit A-4 in evidence.)

Mr. Orr: I next offer the doll identified in the deposition as Exhibit 12, as the Defendant's Exhibit A-5. The name of the doll is "Goldilocks."

(The doll referred to was thereupon marked Defendant's Exhibit A-5 in evidence.)

Mr. Orr: I next offer the doll previously identified as Exhibit 14 in Mr. Rowland's deposition as Exhibit A-6. The name of this doll is "Little Miss Donnett."

The Court: Let it be admitted and marked.

The Clerk: A-6 in evidence.

(The doll referred to was thereupon marked Defendant's Exhibit A-6 in evidence.)

Mr. Orr: I next offer the doll identified as Exhibit 16 in connection with Mr. Rowland's deposition as Defendant's Exhibit A-7. This doll is "June Girl."

The Court: Let it be admitted and marked.

The Clerk: A-7.

(The doll referred to was thereupon marked Defendant's Exhibit A-7 in evidence.)

Q. (By Mr. Orr): Yesterday—Monday, that is—you identified one as "Sugar and Spice." Will you tell me where you ever saw a picture of Sugar and Spice?

(Testimony of Maurice Juster.)

A. I didn't design the doll, Mr. Orr. I may have seen a [122] sketch in several books; I can't go back to the days I was reading them.

Mr. Orr: That will be all.

Mr. Mellin: No questions.

Call Mr. Rowland.

May I ask counsel through your Honor if he would now excuse Mr. Juster so he can take care of his business. There are only two of them, and his wife is ill.

Mr. Orr: I think we are through with him.

Mr. Mellin: That is very kind of you, Mr. Orr; I appreciate that.

The Court: He will be available when you want him?

Mr. Orr: It is a question whether we need him this afternoon in connection with some of the examination of Mr. Rowland.

The Court: All right.

ALLAN L. ROWLAND

called by Plaintiff under Federal Rules of Civil Procedure, Rule 43(b); sworn.

Direct Examination

By Mr. Mellin:

Q. Would you give your full name, your age and your address, Mr. Rowland?

A. Allan Leslie Rowland, age 50, 1980 Washington Street.

Q. And what is your occupation, Mr. Rowland?

(Testimony of Allan L. Rowland.)

A. Secretary and Treasurer of the Nancy Ann Storybook Dolls, [123] Incorporated.

Q. That is the defendant here?

A. Yes, sir.

Q. And when was that corporation organized?

A. The early part of 1946.

Q. And it succeeded a co-partnership, did it?

A. Yes, sir.

Q. And the co-partnership succeeded a corporation?
A. Yes, sir.

Q. And those changes were made not because of a shift in interests, but for tax or other purposes?

A. For business purposes, yes, sir.

Q. How long have you been intimately associated, that is active in the management, of the business?

A. Since the inception of the business.

Q. In '38 or '39? A. '37.

Q. You take charge of all the executive end of the business?
A. Yes, sir.

Q. Isn't that correct? A. Yes, sir.

Q. With respect to trade-marks, you also in your executive capacity take charge of the legal matters in conjunction with registering them, and what have you?
A. That is correct. [124]

Q. So you are thoroughly familiar with all of the trade-marks of the corporation, aren't you?

A. Yes, sir.

Q. And you are also familiar with the sales representatives and the sales matters of the company?
A. Yes, sir.

(Testimony of Allan L. Rowland.)

Mr. Mellin: You will stipulate, of course, Mr. Orr, that Mr. Rowland is an adverse witness? Won't you stipulate to that either?

Mr. Orr: Of course we will stipulate to that.

Q. (By Mr. Mellin): Mr. Rowland, on page 50 of your deposition, which was taken on December 14, 1949, on page 50 commencing on line 22, you were asked this question:

“Q. Now I asked you to—I show you Exhibits 1 and 2, and I will ask you if the two dolls in those two exhibits are dressed alike?

“A. No, sir, they are not.”

That question was asked you and you gave that answer, didn't you? A. Yes, sir.

Mr. Mellin: May it be stipulated that Exhibit 1 to Mr. Rowland's deposition, which that question referred to is “Little Red Riding Hood,” Plaintiff's Exhibit 30 produced by Dollcraft, and Exhibit 2 is a “Little Red Riding Hood” introduced as Defendant's Exhibit A. [125]

Q. Do you recall that question and that answer?

A. Yes.

Mr. Orr: At this time I would like to make the general objection to this comparison of the dolls themselves, because the dolls are not in issue; it is a matter of trade-marks that are being used on the dolls, not the dolls. Similarities and dissimilarities of the dolls have nothing whatever to do with this proceeding.

Mr. Mellin: If your Honor please, it is only a preliminary question, just to identify.

(Testimony of Allan L. Rowland.)

“Q. And you would not mistake one from the other, as far as the dress is concerned?”

The answer was:

“A. No, but I would mistake it for “Red Riding Hood.”

That question was asked you and you gave that answer, did you not? A. Yes, sir.

Q. And that answer is a correct one?

A. Yes, sir.

“Q. You mean you would identify each of the dolls—even if it were not named, you would identify them——

“A. As ‘Red Riding Hood.’ ”

That question was asked you and you gave that answer, didn’t you? A. That’s right. [126]

“Q. As representing ‘Red Riding Hood’?

“A. That is correct.”

That question was asked you and you gave that answer? A. That is right.

Q. Now, isn’t it a fact, Mr. Rowland, that the name “Little Red Riding Hood” was adopted by you and applied to a doll because that doll in appearance simulated a well-known storybook character?

A. No. It was Nancy Ann’s interpretation of “Red Riding Hood.”

Q. And the fact that it is similar to “Red Riding Hood” had nothing to do with your adopting the name “Red Riding Hood” for that doll; is that your answer?

(Testimony of Allan L. Rowland.)

A. As I say, it is her interpretation of what Red Riding Hood looked like, and that is why the mark was adopted.

Mr. Mellin: May that question before the last be read to the witness by the reporter?

(Reporter read the question as follows:)

“Q. Now, isn’t it a fact, Mr. Rowland, that the name ‘Little Red Riding Hood’ was adopted by you and applied to a doll because that doll in appearance simulated a well-known story-book character?”

A. Yes, it is.

Q. And now, would you turn to page 59 of your deposition wherein we referred to “Little Bo-Peep” dolls, and line 17. [127] You had before you at that time, didn’t you, Plaintiff’s Exhibit 31 in this case and Defendant’s Exhibit A-2? A. Yes, sir.

Q. Which were Exhibits 5 and 6 in your deposition? A. Yes, sir.

Q. And this question was asked you, was it not:

“Q. I will ask you whether or not, except for what you said was a similarity of features and size, whether or not there is any other similarity between the dolls not common to all dolls? A. Yes, it is confusingly similar.

“Q. In what way, please?

“A. To a little girl they are both ‘Bo-Peep’ dolls.

“Q. You mean similar in that they are both ‘Little Bo-Peep’?

(Testimony of Allan L. Rowland.)

“A. That is correct, and the average little girl know that a ‘Bo-Peep’ is a Storybook Doll.”

Those questions were asked and you gave those answers? A. Yes, sir.

Q. And what you said as to the name Red Riding Hood designating a storybook character, that goes also for Little Bo-Peep?

A. No, the Storybook “Red Riding Hood” doll had a very definite red cape on it. It was very much on the—very different than these dolls here. The only thing—

Q. Then what did you—Pardon me. [128]

A. The only thing a little girl knows the Storybook “Bo-Peep” dolls by is by a label on the box.

Q. I see; they don’t know it by the nursery rhyme or storybook character?

A. They probably know it by the storybook character, but this is not particular descriptive of Bo-Peep.

Q. The “Little Bo-Peep” doll Exhibit A-2 was somebody’s conception of the storybook character Little Bo-Peep, isn’t that correct?

A. That is correct.

Q. And the name “Little Bo-Peep” was adopted for that doll because it was the conception of somebody of what Little Bo-Peep was in nursery rhymes, is that right?

A. No, it was not adopted for that doll; it was adopted for a doll.

(Testimony of Allan L. Rowland.)

Mr. Mellin: Would you read the question to the witness?

(The reporter read the question.)

A. No, I repeat my answer, that the name was not adopted for that doll; it was adopted for a doll which we later called "Bo-Peep."

Q. And because of the fact that it was somebody's conception of what Bo-Peep, the nursery rhyme character, would look like?

A. Yes, sir.

Q. And that, in substance, is true of all of the other storybook character dolls, that your company puts out today, to wit: [129] "Little Miss Muffett," "Little Miss Donnett" and so on?

A. It is Nancy Ann's version of the doll.

Q. Of the particular character in the nursery rhymes or storybooks? A. That is correct.

Q. Now, on page 71 of your deposition, you were asked this question:

"Q. It is your contention, then, as I understand it, with respect to the names of these dolls, that you are entitled under what you call your ideology and your registrations of trademarks named in the pleadings, to the exclusive use, for example, the name 'Little Red Riding Hood' as pertaining to a doll which represents that fictional character?

"A. That is correct, and the specific numbers mentioned in the counter-claim.

"Q. And each of those? A. Yes."

(Testimony of Allan L. Rowland.)

The Witness: Where are you reading?

Q. I beg your pardon. I gave you page 71, it was on line 15. I read it correctly, didn't I, Mr. Rowland, your answer?

A. Yes, sir, that is correct.

Q. Those questions that I just read you and the answers I read you were asked you and you answered them? A. Yes, sir. [130]

Q. The way I read? A. Yes, sir.

Q. And the answers are correct?

A. Yes, sir.

Q. Now, Mr. Rowland, when you made application—and I notice that you have signed all of these applications for registering trade-marks—you recall the circumstances to some extent, don't you, of filing for them? A. Yes, sir.

Q. At any time, to your knowledge, did you ever advise the patent office that this trade-mark, for example, "Little Red Riding Hood," was for a doll simulating Little Red Riding Hood, to your knowledge?

A. Simulating Little Red Riding Hood?

Q. Or dressed to represent Little Red Riding Hood? A. No, I don't think so.

Q. In other words, what you did to the Patent Office was to represent that this trade-mark "Little Red Riding Hood" was merely applied to a doll, with no other description of the doll, so the Patent Office would have no knowledge that it was applied to a doll dressed to represent that character; isn't that the fact?

(Testimony of Allan L. Rowland.)

A. I think that is a purely legal question.

Mr. Orr: I object to this kind of cross-examination here. If the Patent Office had deemed that of any materiality, they [131] would have asked specifically for it. But the Patent Office did not go into that. Whatever the dress, whatever the appearance, whatever the kind of doll may be involved makes no difference. It is for dolls of the classification and the kind, and the dress is immaterial. It is just immaterial. Seventeen designers will design seventeen different representations of the same character. If they were limited down to a particular dress, it would be the equivalent merely to the copyright on a particular costume in the granting of the trade-mark in the class of the dolls, so that this implication that there was any irregularity in not specifying the manner of dress of the doll is completely out of the case.

The Court: I will let him develop the fact, whatever it may be. The application was for a doll?

A. Yes, sir.

Mr. Orr: The application specifically states it is for dolls, and doll's clothing in the class indicated.

Mr. Mellin: The question I asked him was whether or not to his knowledge at any time did they advise the Patent Office and say to the Patent Office in specification of the doll they were trade-marking that it was a doll that answered or simulated a "Little Red Riding Hood" doll, other than just dolls generally.

Mr. Orr: Again I say it is completely immaterial

(Testimony of Allan L. Rowland.)

and there is no occasion for it, and the Patent Office didn't ask [132] for it, and it would make no difference if they had.

Mr. Mellin: We charge here, and we will develop the fact on argument, that the first time that the Patent Office actually knew that these terms were used descriptively was the time during the contest between this defendant and some other company over the trade-mark, and the Patent Office discovered at that time that the dolls actually used in these classifications were characters or more or less visual representatives of actual characters, and then the Patent Office ruled that, in fact, all trade-marks of this class were purely descriptive. And we maintain that, had the Patent Office known at the time these registrations were applied for, had the Patent Office known at that time, for example, that the "Little Red Riding Hood" trade-mark was applied to a "Little Red Riding Hood" doll, that is, a doll representing that character, that registrations never would have been issued.

Mr. Orr: I completely disagree with Mr. Mellin. When, as and if he develops that in argument, I will be very glad to answer it. I am not going to give a complete and satisfying answer at the present time; I don't think it has any part in the examination of this witness.

The Court: It may or may not have; I am not prepared to say at this time. For that reason I will overrule the objection so that he may have a record on it. You can argue on both sides. [133]

(Testimony of Allan L. Rowland.)

A. I think that is a purely legal question.

Mr. Orr: I object to this kind of cross-examination here. If the Patent Office had deemed that of any materiality, they [131] would have asked specifically for it. But the Patent Office did not go into that. Whatever the dress, whatever the appearance, whatever the kind of doll may be involved makes no difference. It is for dolls of the classification and the kind, and the dress is immaterial. It is just immaterial. Seventeen designers will design seventeen different representations of the same character. If they were limited down to a particular dress, it would be the equivalent merely to the copyright on a particular costume in the granting of the trade-mark in the class of the dolls, so that this implication that there was any irregularity in not specifying the manner of dress of the doll is completely out of the case.

The Court: I will let him develop the fact, whatever it may be. The application was for a doll?

A. Yes, sir.

Mr. Orr: The application specifically states it is for dolls, and doll's clothing in the class indicated.

Mr. Mellin: The question I asked him was whether or not to his knowledge at any time did they advise the Patent Office and say to the Patent Office in specification of the doll they were trade-marking that it was a doll that answered or simulated a "Little Red Riding Hood" doll, other than just dolls generally.

Mr. Orr: Again I say it is completely immaterial

(Testimony of Allan L. Rowland.)

and there is no occasion for it, and the Patent Office didn't ask [132] for it, and it would make no difference if they had.

Mr. Mellin: We charge here, and we will develop the fact on argument, that the first time that the Patent Office actually knew that these terms were used descriptively was the time during the contest between this defendant and some other company over the trade-mark, and the Patent Office discovered at that time that the dolls actually used in these classifications were characters or more or less visual representatives of actual characters, and then the Patent Office ruled that, in fact, all trade-marks of this class were purely descriptive. And we maintain that, had the Patent Office known at the time these registrations were applied for, had the Patent Office known at that time, for example, that the "Little Red Riding Hood" trade-mark was applied to a "Little Red Riding Hood" doll, that is, a doll representing that character, that registrations never would have been issued.

Mr. Orr: I completely disagree with Mr. Mellin. When, as and if he develops that in argument, I will be very glad to answer it. I am not going to give a complete and satisfying answer at the present time; I don't think it has any part in the examination of this witness.

The Court: It may or may not have; I am not prepared to say at this time. For that reason I will overrule the objection so that he may have a record on it. You can argue on both sides. [133]

(Testimony of Allan L. Rowland.)

Q. (By Mr. Mellin): You recall the question, Mr. Rowland?

A. Please repeat it.

(The reporter read the question.)

Mr. Orr: I would like to renew my objection on a further ground: that the file wrapper of this particular application and others has already been offered in evidence by counsel, and the file wrapper speaks for itself. And in any event those matters are left to counsel, the individual officer bringing the instrument instructs the filing of a trade-mark application and the attorney handles the legal matters with the Patent Office.

The Court: Let him develop the fact, whatever it may be. The description was a doll?

Mr. Mellin: Doll and doll clothes and nothing else.

The Court: That is all?

Mr. Orr: If that is the extent of the inquiry, my objection still stands.

The Court: Let the objection stand. I will allow it subject to his motion to strike. It may or may not become material.

A. To the best of my knowledge, no copy of the doll was submitted to the Patent Office, if that is what you want.

Q. And that was true of the registrations "Red Riding Hood," "Miss Muffet," "Little Bo-Peep," "Mistress Mary," "Little Miss Donnett," "Goldilocks," "Sugar and Spice," and "Storybook [134]

(Testimony of Allan L. Rowland.)

Story," "Fairyland" and "June Girl"; is that correct?

A. That is correct. If our attorney didn't want additional information, such as a copy of the doll or something to submit—that I can not recall.

Q. But as far as you know, no dolls were ever submitted? A. No, sir.

Q. I call your attention to the registration of the word "Story," registration 25896, registered June 6, 1950, on an application of November 28th, 1940, for dressed dolls in class 22—and that is Plaintiff's Exhibit 9-A—and ask you to tell me what dolls did you apply the word "Story" to?

A. Well, I don't have to read it to tell you that. We applied it to various dolls throughout the line from time to time.

Q. What do you mean?

A. We put in an additional wristlet on the wrist of these dolls other than the ones bearing the label of the doll.

Q. In other words, from time to time—any particular line of your dolls?

A. No, no particular line of our dolls.

Q. In other words, you followed the practice that you have previously testified to in another situation, that you instructed the shipping department occasionally to put labels on them so that you could comply with the steps required for registration of the word, isn't that correct?

A. To show use. [135]

(Testimony of Allan L. Rowland.)

Q. Just to show use. So you used it at intervals? A. We used it about half the time.

Q. And half the time you left it off?

A. Yes, sir.

Q. And the purpose of that was to show use of a trade-mark registration, is that it?

A. That is correct.

Q. And as a matter of fact, that is what you did with these trade-marks "Fairyland" and "Storybook," isn't that so?

A. No; "Storybook" was on all the dolls all the time.

Q. And on the labels?

A. On the labels at all times.

Q. So that then each doll would carry at least three trade-marks, wouldn't it? A. No.

Q. How many trade-marks would it carry?

A. It would carry the one trade-mark, "Storybook Dolls," which is on every doll.

Q. Yes?

A. And then occasionally it would carry "Story," and "Nursery Rhymes" was used occasionally, and "Fairy Tales" also on the box.

Q. So then it is my understanding of your testimony it would have the three trade-marks: one, "Storybook"; two, "Little Red Riding Hood," if it was Little Red Riding Hood; and three, [136] it would have "Story" or "Fairyland" or something else?

A. In some cases, yes, sir, that is correct.

(Testimony of Allan L. Rowland.)

Q. And other than the word "Storybook," these other trade-marks were shifted; in other words they worked in shifts; you would put on "Story" for a while and then put "Fairylan" on them for a while, and one of the other trade-marks on for a while?

A. That is correct.

Q. In other words, that was part of the policy to attempt to monopolize those various words and secure their exclusive use for Nancy Ann?

A. Not to monopolize them, no.

Q. I don't use that in a vicious sense, Mr. Rowland; I mean to keep it exclusive to yourself?

A. Yes, sir.

Mr. Orr: Your question, of course, is confined to use on dolls.

Mr. Mellin: To the ones that they were applied to, and I am speaking now particularly of "Fairylan" and "Story" and "Nursery Rhymes"; they were applied to the dolls of these nursery rhyme characters, weren't they, and storybook characters such as we have been discussing here?

A. Yes, sir.

Q. They weren't put on any other dolls?

A. Yes, they were put on all the dolls. [137]

Q. Every doll in your line?

A. We didn't limit them to any certain series of dolls.

Q. In other words, you put "Nursery Rhyme Dolls" on dolls representing foreign nations?

A. No, no, not in that sense of the word; I am talking particularly about the one in question, which is "Story."

(Testimony of Allan L. Rowland.)

Q. "Story Dolls" went on each?

A. "Story Dolls" was put on any one of the ones in our line.

Q. When did you first start putting on the word "Story" on these dolls, as you have testified, Mr. Rowland?

A. Mr. Mellin, without looking at the application and going back to the record, I couldn't tell you.

Q. I will tell you what the application says. It says May 10, 1947.

A. It was approximately that time; the application is right.

Q. Do you recall that independently or do you just take the application's word for it?

A. I take the application's word for it; I signed it.

Q. When you see the word "Story" disassociated from the word "Dolls," do you take that to mean Nancy Ann Dressed Doll Company?

A. Any Nancy Ann Storybook Doll.

Q. And that would be true of "Nursery Rhymes"? When you see the words "Nursery Rhymes" disassociated from the word "Dolls" does that immediately mean Nancy Ann Dressed Doll Company to you? [138]

A. Yes, sir.

Q. And that would be true of "Story Book"?

A. As far as "Storybook Dolls" is concerned, yes.

Mr. Mellin: I have, Your Honor, here a certified copy of the file wrapper and contents of opposition No. 24,874, Nancy Ann Dressed Dolls—

(Testimony of Allan L. Rowland.)

Nancy Ann Storybook Dolls, Inc., asking to be substituted—vs. Ippolito, as to trade-marks for dolls dated the 7th day of December, 1949. I ask that be marked for identification as the Plaintiff's next in order.

The Court: Let it be marked.

The Clerk: Plaintiff's Exhibit 55 for identification only.

Mr. Orr: At this time I would like to call attention of the Court and counsel that the proceeding as recorded in this file wrapper has not been completed and that an appeal is pending in the United States Court of Customs and Patent Appeals.

Mr. Mellin: I shall not only advise you of that, but I shall file a certified copy of that opinion at the end of this.

Mr. Orr: Of the opinion?

Mr. Mellin: Of the Court of Customs and Patent Appeals.

The Court: That is only going in for the purpose of identification.

Mr. Mellin: To save time, Your Honor, I am going to introduce this on the theory of introducing admissions and statements against interests of the defendant.

Q. Now, Mr. Rowland, you recall that you testified in that [139] matter just referred to, didn't you?

A. On the Ippolito case?

Q. Yes, A. Yes.

Q. And you worked rather closely with counsel

(Testimony of Allan L. Rowland.)

in connection with that case? A. Yes, sir.

Q. You recall that it was the position of the defendant here, Nancy Ann Dressed Dolls, that the words "Nursery Rhymes" were synonymous with "Storybook," "Mother Goose," and things of that sort?

A. Yes, sir. Are you pertaining to the Nancy Ann Storybook Doll Corporation or the old corporation? You always use the old name.

Q. I will speak of them collectively.

A. All right; fine.

Q. And that is still your contention, isn't it?

A. Yes, sir.

Q. So that, as far as your position is concerned here, the words "Storybook," "Nursery Rhymes," "Mother Goose," "Fairyland" are all synonymous terms, all of which would call to mind, when applied to the fictional characters, all would call to mind the same general fictional characters, isn't that correct?

A. That is a Storybook Doll.

Q. And when someone says, "Little Red Riding Hood," [140] immediately to you that means a Storybook Doll dressed like Little Red Riding Hood; that is correct?

A. Not only to me, but it means that to every youngster in the country.

Q. And regardless of the type of miniature doll, Mr. Rowland? A. Yes, sir.

Q. So that when they see a Hallmark Doll made out of paper, that would be a Storybook Doll to the youngster?

(Testimony of Allan L. Rowland.)

A. That is a paper doll. You are going into something entirely different.

Q. It is still a small doll.

Q. We are talking about miniature dolls. That is a piece of paper, that is a paper doll. It has nothing to do with the doll industry or anything. The youngsters call them little paper dolls.

Q. They simulate Little Red Riding Hood and have "Little Red Riding Hood" printed on them. They wouldn't associate that with Nancy Ann Doll Company? A. I don't believe they would.

Q. And so in that instance when you see "Little Red Riding Hood" on a picturization of Little Red Riding Hood in the form of a paper doll, you wouldn't associate that with Nancy Ann Dressed Dolls Company? A. I would not.

Q. That would mean some other company, Hallmark, for example? [141]

A. It would mean a paper doll.

Q. That is all? A. Yes.

Q. To your knowledge, Mr. Rowland, how long have paper dolls been made and marked with Nursery Rhyme characters? We will take the one Little Red Riding Hood, to your own knowledge.

A. I couldn't say.

Q. Will you say since 1890?

A. I wouldn't attempt to say, because I never investigated.

Q. You know that they were produced prior to the inception of the Nancy Ann Dressed Dolls, don't you?

(Testimony of Allan L. Rowland.)

A. No; I never play with dolls so I really am not cognizant of the fact they were manufactured. I couldn't say truthfully.

Q. But you have made some investigation, haven't you? A. Not paper dolls, I have not.

Q. Let's take other dolls. How long have you known of any other dolls that were called, for example, "Little Red Riding Hood"?

A. I have never heard of one called "Little Red Riding Hood," with one exception.

Q. What was that?

A. That was a company that went defunct, was using the name "Red Riding Hood," in which we made a full investigation, found out the company was broke, and we started using the name, and after due course we applied for registration of the name. [142]

Q. But you know now that it is rather common throughout the country and widely dispersed, these little paper dolls?

A. I don't think they are. From what I understand, the company is discontinuing them; they are not very successful.

Q. You happen to know they are on sale right here in San Francisco? A. Yes.

Q. In fact, right next to the courthouse?

A. They are on the rack. They are not being sold, very many of them, so therefore they are fast disappearing from the market.

Mr. Mellin: May we have a recess?

(Testimony of Allan L. Rowland.)

The Court: We will take a recess.

(Recess.)

Q. (By Mr. Mellin): Mr. Rowland, before recess we were speaking of paper dolls, and you recalled, as I recall it, the small paper dolls which are put out by Hallmark. And I show you a Little Red Hiding Hood, so marked, and ask you if that is one of those we had reference to?

A. It is.

Q. And "Little Bo-Peep"? A. Yes, sir.

Q. And "Mary, Mary, Quite Contrary"?

A. Yes, sir.

Q. And "Little Miss Muffett"? And "Little Girl with a Curl"? [143] A. Yes, sir.

Q. Now, I call your attention that in each envelope for this there is a list of dolls. Would you read this into the record, please?

A. "Little Bo-Peep," "Cinderella," "Mary, Quite Contrary," "Mary Had a Little Lamb," "Little Red Riding Hood," "Little Miss Muffett," "Tommy Tucker," "Little Boy Blue," "My Pretty Maid," "Little Girl With a Little Curl," "Queen of Hearts," "Bobby Shaftoe," "Little Polly Flinders," "Curlilocks," "Polly Put the Kettle On," and "Peter Piper." There is also "Dolls of the Nations." Do you wish that?

Q. Thank you, no.

And all of these marks you recognize from your knowledge of the business were all put out by Hallmark Company in that fashion?

(Testimony of Allan L. Rowland.)

A. Of these that you identified, yes, sir.

Mr. Mellin: I will offer that group of paper dolls in evidence as the next exhibit.

Mr. Orr: Objected to as wholly irrelevant and immaterial in this proceeding.

The Court: Indicate the purpose of the offer for the record.

Mr. Mellin: The purpose is to show that there has been no exclusive use of these character names for dolls by this defendant. [144]

The Court: For that limited purpose, I will allow it.

Mr. Mellin: May we put them in just as one exhibit, your Honor?

The Court: Very well.

(Whereupon the paper dolls referred to were marked Plaintiff's Exhibit No. 56 and received in evidence.)

Q. (By Mr. Mellin): You notice that on each of these dolls, like the one that represented Little Red Riding Hood, it had the notation "Red Riding Hood" on it? A. Yes, sir.

Q. And that was true of "Bo-Peep" and the rest of them? A. Yes, sir.

Q. And you would say that those dolls so designated would not tend to lead anyone to believe that they were Nancy Ann dolls? A. Yes, sir.

Q. In other words, there would be no confusion between the source of the paper dolls, for example, because of their names, one named "Little

(Testimony of Allan L. Rowland.)

Red Riding Hood," and a Nancy Ann doll "Little Red Riding Hood"? There would be no confusion in anyone's mind as far as you are concerned, that those dolls were produced by Nancy Ann?

A. Mr. Mellin, there has been quite a bit of confusion. I think when they first came out the general public believed that those dolls were being put out by Nancy Ann.

Q. But as you stated before recess, as far as you could see, [145] there would be no confusion?

A. Not now, no.

Q. Would you say that the trade-mark that you have used, as you have testified, "Nursery Rhymes" as applied to characters, fictional characters in nursery rhymes, would be descriptive of those dolls?

A. No, sir, it would not be descriptive; it is only descriptive of the ones that we have designated as "Nursery Rhyme Dolls."

Q. "Nursery Rhyme Dolls." That term would be descriptive and particularly apply to those dolls in that class?

A. To those dolls and to those dolls only.

Q. You have never taken a contrary position, have you? A. Not to my knowledge.

Q. Do you know from your experience in this trade-mark litigation that you have been involved in what is meant by the "generic" as applied to a trade-mark? A. Well, the use of it.

Q. Yes, if it is generic to the goods.

(Testimony of Allan L. Rowland.)

A. It is synonymous, to be used at the same time with the goods.

Q. Yes? A. Yes.

Q. In other words, generic would be like, let us say, automobile is generic to an automobile. Would you say then that [146] the trade-mark "Nursery Rhymes" would be generic to dolls representing fictional characters of nursery rhymes?

A. Only to those that we have put out.

Q. Now, you know the Hollywood Doll Company, don't you, and its products? A. Yes.

Q. In fact, you know them rather well?

A. Yes, sir.

Q. Do they put out any miniature dolls representing fictional characters? A. Yes, sir.

Q. Can you tell us if you know which ones they are?

A. Offhand I can not. They have a list of about a hundred dolls.

Q. And do they include "Little Red Riding Hood"? A. No, sir; no more.

Q. No more? A. No, sir.

Q. The reason that it doesn't is by an agreement with the Nancy Ann Doll Company, isn't it?

A. They never used "Red Riding Hood"; they used "Little Red."

Q. "Little Red"?

A. Yes, and they agreed to discontinue that.

Q. And do they make any of the fictional characters that you [147] do?

(Testimony of Allan L. Rowland.)

A. Nothing that conflicts with our line.

Q. Like "Little Goldilocks" and so on?

A. I don't believe they use "Goldilocks." After all, there is thousands of characters they can use; they don't have to copy our line now.

Q. I see. You did take the position before the Patent Office, didn't you, that the trade-mark "Nursery Rhymes" was descriptive of dolls representing nursery characters—nursery rhyme characters, didn't you?

A. Put out by us, yes sir.

Q. And that was the basis of your opposition to the registration of the trade-mark "Nursery Rhymes" by Ippolito, isn't that correct—Hollywood Doll Company?

A. I believe it was; I would have to check with my counsel to make sure.

Q. You recall the decision coming down in that case, don't you?

A. Yes, sir.

Q. In which the—just a minute; let me get my question in, Mr. Orr, then you can object. And you recall, in substance, that the Patent Office held that the trade-mark, or alleged trade-mark "Nursery Rhymes" was descriptive of a class of nursery rhyme characters, do you not?

Mr. Orr: I object to the question on the ground that the [148] record of the proceedings has already been offered in evidence. The record speaks very clearly of what the decision has been, and it is not fair to this witness to question him on the

(Testimony of Allan L. Rowland.)

terminology and the details of the procedure which were handled by his counsel representing him in the Patent Office; that the record already produced here in evidence shows that there is an appeal still pending. It is unfair to this witness to continue asking him details of the terminology of language which require reading and understanding of the entire record to show their true value.

Mr. Mellin: I would like to suggest to the Court the reason I am asking the question. I am not asking about details of terminology.

Mr. Orr: The details of "generic terms" and "descriptive terms," those are terms which have a significance in a legal way that a layman should not be required to understand.

The Court: We will have the reporter read the question.

(Question read.)

The Court: Overruled. If he knows, he may answer.

A. I am not prepared to answer that for the simple reason that I am not sure of my statement.

Q. You have read that decision, haven't you?

A. Well, no, I just took what Mr. Orr told me and let it go at that.

Mr. Mellin: May I read it into the record, your Honor? [149]

Mr. Orr: At this time I am going to object to it on the ground that it irrelevant and immaterial in this procedure; the words "Nursery Rhymes"

(Testimony of Allan L. Rowland.)

is not a mark that is involved in this proceeding.

Mr. Mellin: If your Honor please, this is very essential. He has called attention to this litigation. The reason for it is that this witness testified that the term "Nursery Rhymes" was synonymous with several terms, "Story Book," "Fairylend," and so on, as applied to dolls.

Mr. Orr: As applied to Storybook Dolls, yes.

Mr. Mellin: As applied to dolls. There is the decision of the Federal Patent Office which in effect, as we will show by these records, ruled that all of these trade-marks were invalid trade-marks because of descriptiveness and which is decided in the "Nursery Rhymes" case. This man, knowing that to be a fact, threatened our customers with suits on these trade-marks.

My point in showing that under an action of this sort for unfair competition is to show that those threats were made with some knowledge, at least, that their trade-marks were invalid, therefore were made maliciously. I think we are entitled to show the intent and the reason behind those threats to our customers.

We will show by this whole proceeding in litigation that reasonable men should know that these trade-marks here involved [150] are invalid trade-marks. That is shown by this witness' own suit that "Nursery Rhymes," "Storybook," and what have you are descriptive terms of nursery rhyme characters which the Patent Office held here; in fact, this defendant took an appeal from that very point that

(Testimony of Allan L. Rowland.)

it was not descriptive and was overruled, and the Court of Customs and Patent Appeals sustained the examiner in this case and sustained the commissioner in this case, that "Nursery Rhymes" was descriptive; in fact, in one place, said there is no proprietary interest of anyone in the names of nursery characters, and everyone should have the right to employ the nursery rhyme character names to dolls of their own conception. We want to show the malice and intent of the defendant behind these threats to our customers when that matter had already been decided in the Patent Office, and I think for that purpose I should be able to ask this witness if he didn't have notice of this ruling at the time when they sent those notices to our customers, by which we lost our customers.

Mr. Orr: Mr. Mellin ignores the fact that at the time this decision was rendered, there were other matters pending in this proceeding that went on appeal to the Court of Customs and Patent Appeals and I interpret the language of the decision to mean that the words "Nursery Rhymes" are not descriptive of dolls in general; that they are descriptive of the group of dolls that the Nancy Ann organization has made and sold, and that because the mark is descriptive of those, it would be [151] likely to cause confusion, and it refused the mark "Nursery Rhymes" to Ippolito, whose application was being passed on.

In another case involving Toyland, it was held

(Testimony of Allan L. Rowland.)

that Toyland was not descriptive, and it was allowed to be registered. Toyland was held not to be confusing and in that case the Patent Office was sustained and the word "Toyland" was allowed to be registered.

In the case of "Nursery Rhymes," they held that "Nursery Rhymes" was descriptive of goods made by Nancy Ann, although not descriptive of dolls in general, and they therefore sustained the decision of the Patent Office. It was expressly stated in their decision that the mark is not descriptive of dolls in general.

Mr. Mellin: May I read the Court just one paragraph in that case? I am reading the decision of the United States Court of Customs and Patent Appeals—that is the decision I was referring to:

"The examiner further rejected the registration *ex parte* for the stated reason that the mark would be understood by the purchasing public as referring to any and all reproductions of fictional characters from 'Nursery Rhymes' as a class. He held that every producer of dolls had the right freely to make and sell his conception of 'Nursery Rhyme' characters familiar to everyone from childhood days and that the common right to make any article is [152] inseparable from the right to use words which aptly describe it. He has therefore held that the descriptiveness clause of Section 5 of the involved Act was deemed

(Testimony of Allan L. Rowland.)

to constitute a bar to the registration of appellant's mark.

"On appeal the commissioner sustained all of the reasoning advanced by the examiner of interferences.

"We are of opinion that the decision of the commissioner is without error."

Now, what I wanted to do, your Honor, is to show that this witness had knowledge that the examiner of interferences in the Patent Office in this proceeding held that "Nursery Rhymes" was descriptive in such terms that would indicate to any reasonable person that all these marks were descriptive and invalid, and then to ask the witness if he had knowledge of that decision prior to sending these letters. Then I am through. I am not asking him to interpret it. I will eventually question him as to whether he had knowledge of this decision prior to that time.

Mr. Orr: May I also read into the record a further statement or decision of the Court of Customs and Patent Appeals in this nursery rhymes case?

Mr. Mellin: You have a certified copy of that decision?

Mr. Orr: I have a certified copy of that decision in my hand. At the bottom of page 5 it says:

"While we do not consider the mark 'Nursery Rhymes' [153] descriptive of dolls generally, we do consider it highly suggestive of a class of dolls in particular.

(Testimony of Allan L. Rowland.)

“The suggested mark ‘Nursery Rhymes’ is generic to the specific marks registered to appellee, each of which is individually suggestive of a segment of the group of which appellant’s suggested mark is suggestive. It is apodictic, in our opinion, that confusion as to the origin of the goods of the parties would follow if registration were granted to appellant.”

Q. (By Mr. Mellin): Were you aware of it at the time it was handed down, that decision of the Commissioner of Patents, and of the Examiner of Interferences in the Patent Office in this Ippolito matter we have been discussing, which is Proceeding No. 24874?

A. Well, I was not fully aware of all the details; I left it up to counsel.

Q. At the time these notices were sent to Macy’s and the other customers of the plaintiff, you and your counsel both were aware of the decisions we have just been referring to, were you not?

A. Well, yes, we were both aware of them.

Q. And you used the same counsel——

A. But as far as I am concerned, the actual detail, I was not particularly aware of that.

Q. I am not asking that, Mr. Rowland.

A. Okay. [154]

Q. And you used the same counsel, that is, the firm of Charles Evans, both in the Ippolito proceeding and in the matter of the notification of the customers in this instance?

A. Yes, sir, that is correct.

Mr. Mellin: No more questions, Mr. Rowland.

The Court: Are you through with this witness?

Mr. Orr: I will reserve my examination until later.

The Court: Very well.

Mr. Mellin: You may be excused as far as I am concerned.

I have here a certified copy; there are some sections of it I should like to read into the record as statements against interest, and I should also like to introduce it for the purpose of showing a certified copy of the decision of the Examiner in the Interference that was noticed in this proceeding. This has a bearing on the instant case.

And then I should like to offer a certified copy of the decision of the Court of Customs and Patent Appeals.

The Court: Very well.

Mr. Mellin: Is it your Honor's wish that I merely offer it all and then read to the Court the pertinent parts in all argument or quote them in the brief, or does the Court wish that we read them into the record now?

The Court: Make a record of them now.

(Certified copy of file wrapper in Opposition No. 2487 for *Nancy Ann Dressed Dolls v. Ippolito* was thereupon marked [155] Plaintiff's Exhibit No. 55 in evidence.)

Mr. Mellin: I will now refer to page 5 of the Notice of Opposition which was verified by Mr.

Allan L. Rowland, the witness, and I read from page 5 of that document:

“Applicant’s mark ‘Nursery Rhymes’ is substantially indetical in psychological derivation and effect with Opposer’s trade-marks ‘Storybook,’ ‘Mother Goose,’ and other marks derived from the nursery rhymes as above noted, and is confusingly similar thereto in connotation and suggestion; that applicant’s said mark is a generic term applicable to the nursery rhyme names, characters and expressions used by Opposer upon its doll products as above set forth; and that concurrent use of Applicant’s mark, ‘Nursery Rhymes,’ and Opposer’s above-listed marks upon substantially identical goods will confuse the trade and the purchasing public.”

I am now reading from Mr. Rowland’s cross-examination by Mr. Naylor on page 111 in pencil at the bottom of that exhibit 55 for identification:

“XQ. 122. I understood you to say, Mr. Rowland, that the term ‘Storybook Dolls’ covers all of the nursery rhymes; was that your answer?

“A. No. I said when we selected the title of ‘Storybook Dolls,’ it was our opinion that it covered nursery rhymes, fairy tales, fairyland, ‘Mother Goose,’ and all other items [156] of that nature.

“XQ. 123. In other words, it embraces the whole of the children’s literature, does it not?

"A. In our opinion, it does.

"XQ. 124. So that the position as taken is that no other manufacturer of dolls may use any word which appears in children's literature, is that correct?

"A. No, sir, only those for which we have trade-marks."

I am now going to read from the Opposer's brief on the final hearing. It is on page—let's skip that one—from page 5 of the brief or page 161 of the document.

"From the outset Nancy Ann Abbott has selected as the subjects and names for her dolls characters which have been known to and loved by little children for generations. For the most part, the dolls embody Miss Abbott's conception of characters from 'Mother Goose' and the 'Nursery Rhymes' and from fairy tales and other children's stories. In Miss Abbott's personality there has been coupled with the interest in and love of the characters of childhood fantasy, common to little girls in general, an artistic and creative talent which has enabled her to create beautiful little dolls portraying those characters in a way that has appealed to little girls (including grown-up little girls) throughout the country."

Now, continuing to read from that: [157]

"Her dolls have been marked and sold with labels bearing as trade-marks the names of many of 'Mother Goose,' nursery rhyme, fairy

tale and other story-book characters and have gained nation-wide and international recognition under those marks and labels, as the products of Miss Abbott's organizations. Her dolls have supplied to little girls (of all ages) an outlet for the collector instinct which in little boys (young and old) is directed to collecting marbles, match covers, stamps, coins and other objects, with or without value. Little girls instinctively mother their dolls; and, once a family of dolls is started, the owner strives to add to it until she is surrounded by all her playmates from the make-believe realms of the nursery rhymes, fairy tales and story books."

I will read from the brief for the Opposer-Appellee to the Commissioner of Patents, and that party was the Nancy Ann Dressed Dolls in that same Opposition.

"Secondly, the Examiner of Interferences took up and decided as an *ex parte* matter that the designation 'Nursery Rhymes' is unregistrable as a trade-mark because of descriptiveness. On that point the Examiner ruled that the mark is descriptive of the doll products for which registration was sought, and hence that the applicant is not entitled to register the mark."

I should like to read into the record the decision of the [158] Examiner in Interference:

"This is an opposition in which only the Opposer has filed testimony and both parties

have filed briefs and were represented at the hearing.

“The mark disclosed in the applicant’s application consists of the notation ‘Nursery Rhymes’ and is used upon dolls.

“The Opposer is engaged in the sale of the same kind of goods under the names of various characters found in children’s literature as well as in connection with excerpts or paraphrases of the texts relating to such characters obtained in the books from which the names were derived. Many of the dolls of Opposer’s manufacture were inspired by nursery rhymes, and it is upon this line of dolls that its right of action in this case is essentially predicated. As stated in the Notice of Opposition, the notation, ‘Nursery Rhymes,’ sought to be registered is a ‘generic term applicable to the nursery rhyme names, characters and expressions used by Opposer upon its doll products’; and by reason thereof, it is in effect further averred that the applicant’s mark cannot serve to identify its goods to the exclusion of the like products of the Opposer, and that its use by applicant as a trade-mark consequently is calculated to cause confusion in the trade.

“The party Nancy Ann Storybook Dolls, Inc., which [159] has been permitted to intervene herein as assignee of the original Opposer, through its assignor and other predecessors in business has been engaged in the manufacture of dolls since many years prior to the earliest

date claimed by the applicant. This business, which was founded in 1935 by the Opposer's witness Abbott and has been carried on through successive partnership and corporate organizations with which she since has been actively associated, has been based largely on the idea of designing dolls embodying Miss Abbott's conception of characters from Mother Goose and other nursery rhymes and story books generally familiar to everyone. The goods produced by the Opposer, which now amount to approximately 5,000 items per day, comprise a long list of characters (Exhibits 3, 6, 7 and 8), inclusive, of numerous dolls of distinctive forms and costumes specially designed to represent such nursery rhyme personalities as 'Little Miss Muffett,' 'Jack and Jill,' and the like. These dolls are listed in Opposer's catalogues by the names of the characters which they are designed to depict, and each doll is identified by a wristlet label bearing the appropriate name (Exhibit 1). Also, the boxes in which they are sold are provided with labels (Exhibit 2) containing excerpts or slightly modified selections from the nursery rhymes from which the names were respectively taken. [160]

"It fails to appear that the expression 'Nursery Rhymes' sought to be registered has ever been used by the Opposer's organization other than orally. Nevertheless, this expression is generically descriptive of the entire line of dolls sold by the Opposer under the names of nur-

very rhyme characters. The Opposer and its customers, therefore, are entitled to use the designation 'Nursery Rhymes' to identify this line of goods; and it seems clear that its exclusive use by the applicant as a trade-mark inevitably would lead to confusion and deception of purchasers, to the injury of the Opposer. Under such circumstances it is immaterial here whether or not the Opposer heretofore has had occasion to make use thereof in any form."

Accordingly, the Notice of Opposition is hereby sustained.

"There remains 'to determine ex parte, and without reference to the issues raised by the Notice of Opposition,' the question of registrability of the applicant's mark.

"In the case of Virginia Dare Extract Co., Inc., v. Gray, 51 U.S.P.Q., 228, an opposition proceeding involving an application for the trade-mark 'Virginia Dare' for dolls, the Commissioner refused registration to the applicant ex parte, for the reason that such goods comprehended dolls purportedly fashioned after the likeness of the historical character of that name and hence that the mark is 'descriptive' and publici [161] juris. Likewise, in the recent case of ex parte Nancy Ann Dressed Dolls, 74 U.S.P.Q. 270, registration of 'In Powder and Crinoline,' for dolls, was refused on the grounds that it is descriptive of dolls dressed in the Colonial attire thereby indicated. In the present case the mark 'Nursery Rhymes' sought to

be registered is of even broader scope, since it would be understood by the purchasing public as referring to any and all of the fictional characters of nursery rhymes as a class.

“Certainly every producer of dolls is entitled freely to make and sell his conception of nursery rhyme characters familiar to all from childhood. And it is fundamental that the common right to make any article is inseparable from the right to employ words which aptly describe it. (Citing cases.)

“The descriptiveness clause of Section 5 of the Act is accordingly deemed to constitute a bar to the registration sought by the applicant.

“For the reasons indicated, it is further adjudged that the applicant is not entitled to the registration for which he has made application.”

I now wish to read into the record a decision of the Commissioner of Patents on the appeal from the Examiner of Interferences in that same proceeding.

After giving the title and name of the cause:

“The Examiner of Interferences has sustained [162] opposition to an application, Serial No. 481227, to register a trade-mark comprising the words ‘Nursery Rhymes’ under the Trade-Mark Act of 1905, as a trade-mark for ‘dolls,’ and applicant appeals.

“The Notice of Opposition sets out as a basis for Opposer’s right to oppose in the above-

entitled proceeding, its sale, since long prior to any date claimed by applicant, of dolls 'with names, characters and jingles derived from the nursery rhymes and child story books familiar to children throughout the United States, * * *' and that it has applied to said dolls and their packages 'labels bearing the names of nursery rhyme and story book characters and/or extracts from nursery rhymes relating thereto.' As illustrative of this, paragraph No. 1 of the Notice of Opposition recites thirty-six names so used, of which 'Little Boy Blue,' 'Little Red Riding Hood,' 'Little Miss Muffett,' 'Jack,' 'Jill,' and 'Little Bo-Peep' are regarded as typical. The Notice also recites a number of registrations of such names under the Trade-Mark Act of 1905 by Opposer, and alleges that applicant's mark 'Nursery Rhymes' simulates or suggests such trade-marks to an extent that it is likely to cause confusion in trade and mistake in the mind of the purchasing public. It also sets up ownership and use of both 'Storybook' and 'Mother Goose' as trade-marks and alleges that 'applicant's said mark is a generic term [163] applicable to the nursery rhyme names, characters and expressions used by Opposer upon its doll products.' There is also reference to common 'psychological derivation' between Opposer's said mark and that which applicant seeks to register.

"The Notice of Opposition therefore appears to be based upon the confusion in trade clause

of Section 5 of the Trade-Mark Act of 1905, and upon the alleged descriptive or generic nature of applicant's mark. The Examiner of Interferences in sustaining the Notice of Opposition referred specifically to the allegations that the mark sought to be registered 'is a generic term' for such products and that 'it cannot serve to identify its goods to the exclusion of the like products of the Opposer.' The Examiner found that Opposer has proved use of its marks referred to since prior to any date claimed by applicant, and that Opposer's business is based largely on dolls designed to embody the Opposer's president's conception of characters from nursery rhymes and similar sources. Opposer's sale methods included affixing a wrist label bearing the name to each doll, and each of the boxes in which the dolls are packed contains an excerpt from the corresponding nursery rhyme. Opposer's testimony, particularly that of the department store buyers, makes clear that Opposer and others have sold dolls designed to depict [164] characters in nursery rhymes and similar literature, and that character dolls purporting to represent different characters of literature, history or nationality have been widely known and sold. While none of Opposer's marks as such appear to resemble 'nursery rhymes' either in sound, appearance or meaning, it is my opinion that the Examiner of Interferences correctly found as alleged by Opposer that the expression

‘Nursery Rhymes’ is a descriptive or generic designation of an entire line of dolls sold by Opposer, and that Opposer and its customers are entitled to use of such descriptive designation to identify this line of goods even though any use of the term in connection therewith has been oral and they have never applied it to their goods.” (Citing cases.)

“In addition to finding that Opposer was entitled to maintain its opposition for the foregoing reasons, the Examiner of Interferences proceeded *ex parte* to consider applicant’s mark and to refuse it on the ground of its descriptiveness. This *ex parte* holding is challenged, it being contended that the words are not descriptive of the goods and that neither the Examiner of Interferences nor this Office on appealing has authority to make such *ex parte* ruling in such a matter.

“As to the right of the Examiner to consider this *ex parte* issue with reference to applicant’s mark, there [165] can be no question but that it is not only the Examiner’s right but his duty to consider this in an appropriate case.” (Citing cases.)

“It is contended on this appeal that this authority does not in any event extend to a case in which the opposition is sustained, but only where it is dismissed.” (Citing cases.) “The latter case has been since the hearing in this matter been reversed on May 28, 1948, by the United States Court of Appeals (No. 9574).

Neither case is, however, believed to justify such a contention, but if any doubt existed it appears to have been settled by the decision in *Columbia Broadcasting System, Inc., v. Technicolor Motion Pictures Corporation*, *supra*, in which the court based its decision on the point of descriptiveness, stating that it was not necessary to pass upon the correctness of the Patent Office ruling sustaining the opposition on the basis of the *inter partes* question there involved. It is therefore clear that it was not only the Examiner's right but his duty to determine this point without reference to the issues of the opposition proceeding so that an apparent *prima facie* exclusive right to such descriptive term might not be granted to applicant in the event of any disagreement with the holding as to opposer's rights to sustain the opposition.

"As to the correctness of the holding that the term is [166] descriptive, there can be little question. As to this the Examiner stated:

" 'Every producer of dolls is entitled freely to make and sell his conception of nursery rhyme characters familiar to all from childhood. And it is fundamental that the common right to make any article is inseparable from the right to employ words which aptly describe it.' " (Citing cases.) " 'The descriptiveness, clause of Section 5 of the Act is accordingly deemed to constitute a bar to the registration sought by the applicant.' "

“That ‘Nursery Rhymes’ is aptly descriptive of character dolls which fall within the group of characters identified by nursery rhymes hardly requires argument.” (Citing cases.)

“The decision of the Examiner of Interferences is affirmed.”

I offer the document from which I read in evidence as Plaintiff’s Exhibit 55.

Mr. Orr: At this time I move to strike the exhibit and I move to strike all extracts which have been read into the record on the ground that they are wholly irrelevant and immaterial, having no evidentiary value whatsoever in this case.

The Court: Indicate for the record the purpose of the offer. [167]

Mr. Mellin: The purpose of the offer—I read from this record statements which are attributable to the defendant as to the descriptiveness of names.

Mr. Orr: They are utterly argumentative and have no bearing on any of the marks involved in this. “Nursery Rhymes” is not involved.

Mr. Mellin: If your Honor please, the witness stated that “Nursery Rhymes” are synonymous with “Storybook,” “Fairyland” and the others.

The Court: I will deny the motion to strike. It may or may not become material.

Mr. Mellin: I have here for the Court’s convenience a certified copy of the decision of the United States Court of Customs and Patent Appeals which is not in print. I should like to offer it for the record in evidence.

Mr. Orr: Certainly decisions of the Court of Customs and Patent Appeals should go in.

The Court: Have you got a copy of it?

Mr. Orr: Yes, I have a copy.

The Court: It may be admitted and marked.

The Clerk: 57 in evidence.

(The certified copy of decision referred to was thereupon marked Plaintiff's Exhibit No. 57 in evidence.)

Mr. Mellin: That will conclude the plaintiff's opening case, your Honor. [168]

Mr. Orr: May we begin our case after the recess at noon?

The Court: Very well. We will take an adjournment until 2:00.

(Thereupon a recess was taken until 2:00 o'clock p.m.) [168-A]

August 22, 1950, 2:00 P.M.

ALLAN L. ROWLAND

recalled for the defendant; previously sworn.

Direct Examination

(Continued)

By Mr. Orr:

Q. Will you state again, Mr. Rowland, your connection with the defendant in this action, Nancy Ann Storybook Dolls?

A. Secretary and treasurer.

Q. How long have you been actively connected

(Testimony of Allan L. Rowland.)

with Nancy Ann Storybook Dolls, Inc., and its predecessors? A. Since its inception in 1937.

Q. Will you state briefly the beginnings of the organization that has developed into the Nancy Ann Storybook Dolls, Inc.?

A. Well, we started in February, 1937, and it was solely Nancy Ann's idea of the creation of these characters.

Q. Going back of the forming of the original corporation, can you give me a little of the background or how the line of dolls was originated in the first place—the idea was originated?

A. Yes, the idea was originated by Nancy Ann Abbott.

Q. How did you become interested in the project?

A. Well, I met Nancy through mutual friends and became interested in the business, and we borrowed money to start the thing; we borrowed \$500 to start the business.

Q. And what was really the very beginnings of the business? [169] Nancy Ann had not made dolls herself?

A. Nancy Ann was making dolls herself in a small circulating library on Sutter Street, was selling them to her friends, and she sold about 450 to the Metropolitan store managers one Christmas. All the girls became so entranced with them that they brought back a whole load of orders, more or less started her going on it.

Q. When you became interested, what steps did

(Testimony of Allan L. Rowland.)

you take toward putting it into a commercial enterprise?

A. Well, we hired salesmen and started to manufacture dolls in a very small manner.

Q. Was that before or after the corporation was formed?

A. That was after the corporation was formed.

Q. The corporation was formed in 1937?

A. November, 1937, yes, sir.

Q. What was your position at that time?

A. Well, most everything.

Q. I mean, in general, what was your occupation at the time you became interested in——

A. I was an auditor for the State Corporation Department.

Q. How long did you continue business as the initial corporation, the Nancy Ann Dressed Dolls, Inc.?

A. Until 1942. At that time we changed to a partnership and early in '46 it was back to a corporation again.

Q. How did the ownership interest in the partnership compare [170] with the ownership interests in the initial corporation?

A. Identical at all times.

Q. Who were the incorporators, those of interest in the original corporation?

A. Nancy Ann Abbott and Fred Anderson and myself.

Q. Were those interests preserved in the same ratio in the partnership?

(Testimony of Allan L. Rowland.)

A. Yes, sir, they were.

Q. And in the transfer from the partnership to the present corporation Nancy Ann Storybook Dolls, Inc., when did you say that occurred?

A. In the early part of 1946.

Q. And did the partnership interests remain the same? A. Identical.

Q. You say that you started out in your production on rather a small scale. And by a small scale, what would you estimate the number of dolls per day or per week? A. Well——

Q. To start with.

A. It is a pretty long time, but we were making probably four or five dozen dolls a week at the very beginning.

Q. And you have been in production continuously since that time? A. Yes, sir.

Q. What did you do in the matter of appropriating names or [171] trade-marks for your products in the early days of your organization?

A. Well, we started out with the name Nancy Ann on the dolls, and at that time we found out there was another Nancy Ann doll on the market, so after advice of counsel, we backed away from that and we made a very thorough search of the records and found out that "Storybook" was not being used and at that time we adopted the name, or we registered the name "Storybook Dolls" as our trade-mark.

Q. Prior to the time you had adopted the mark

(Testimony of Allan L. Rowland.)

“Storybook,” had you applied marks of any kind to individual dolls that had been marketed?

A. I believe we did, yes, sir.

Q. Could you recall what some of those names were?

A. Some of the early ones were “Red Riding Hood” and “Bo-Peep” and “Mistress Mary,” and how many more I can’t say offhand.

Q. And at that time did you make a check of the marks to determine whether or not the names that you were using were in use by others?

A. Yes, sir, we made a check of the marks to find out if any dolls were being used with those names, and at the time we applied for the registration, there was nobody using those particular names on any dolls.

Q. In this case there are involved a number of marks, including the marks “Red Riding Hood,” “Little Miss Muffett,” “Little [172] Bo-Peep,” “Mistress Mary,” “Little Miss Donnett,” “Curly Locks,” “Goldilocks,” “Sugar and Spice,” “Storybook,” “Fairyland Dolls” and “Story.” Will you state whether or not the Nancy Ann Storybook Dolls, Inc., is the owner of the trade-marks which I have just enumerated? A. They are.

Q. And can you state whether or not those marks have been registered? A. Yes, they have.

Q. I will direct your attention to a booklet containing registrations of the marks I have enumerated and ask if you recognize those as copies of the

(Testimony of Allan L. Rowland.)

registrations which have been granted to your company or its predecessors.

Mr. Mellin: If your Honor please, that would be just a complete duplication in the record of what we have offered.

Mr. Orr: It will be a duplication, but in a convenient form, and I think perhaps the Court will accept it as an exhibit.

A. Yes, they are all——

The Court: Let me see. You may proceed.

A. Yes, they are all marks that have been registered by us.

Mr. Orr: I would like at this time to offer the booklet just identified by the witness as a booklet containing the registrations here involved.

The Court: It may be admitted and marked.

The Clerk: Defendant's Exhibit B. [173]

(The booklet referred to was thereupon marked Defendant's Exhibit B in evidence.)

Mr. Orr: This could be marked B with the individual registrations indicated, I suppose, 1 to 11 in the order in which they appear in the book.

Q. Now, some of those marks have been issued to the initial corporation, perhaps others to the partnership or the later corporation. Have assignments been duly made and recorded with respect to the ownership of these registrations?

A. They have.

Q. They have the original assignments?

A. Yes, sir, I have.

(Testimony of Allan L. Rowland.)

Q. I direct your attention to a photostat copy of an assignment which on its face indicates that it has been recorded in the Patent Office Liber C-196, page 532, and ask you if you recognize what that instrument is?

A. That is an assignment on the Nancy Ann Dressed Doll Corporation to the partnership.

Mr. Orr: I will offer the photostat copy of the assignment just identified by the witness as Defendant's exhibit next in order.

The Court: Let it be admitted and marked.

The Clerk: Defendant's Exhibit C in evidence.

(The assignment referred to was thereupon marked Defendant's Exhibit C in [174] evidence.)

Q. (By Mr. Orr): You have also produced for me a photostat copy of an assignment, or, rather, you have produced the original of an assignment which shows on its face that it has been recorded in Liber R-205, page 442 of the Patent Office, and ask if that is one of the assignments which you have referred to? A. It is.

Q. I will present you a photostat copy and ask if that is a copy of that instrument you have just identified as the original? A. It is.

Q. I note that the Liber number and page number do not appear on the photostat copy. Is that because the photostat was made before the instrument was recorded? A. That I couldn't say.

Mr. Orr: I will offer the photostat copy of the

(Testimony of Allan L. Rowland.)

assignment just identified by the witness and ask that it be marked Exhibit C-1.

The Court: It may be admitted and marked.

The Clerk: Defendant's Exhibit C-1 in evidence.

(Photostatic copy of assignment referred to was thereupon marked Defendant's Exhibit C-1 in evidence.)

Q. (By Mr. Orr): Beginning with the small production which you say you began with back in 1937, what can you say as to the growth of your company and the expansion of its production? [175]

A. Well, from 1937 to the present day we have made about ten million dolls.

Q. And that sale has been continuous over the period from 1937 to the present time?

A. Yes, sir, it has.

Q. Over what territory do you sell those dolls?

A. Well, practically all over the world and all the United States and Canada, England, South Africa, the Philippines, Occupied Japan.

Q. In general, what has been the policy with respect to the type of distributor to whom you sold your dolls?

A. I didn't hear the first part of your question.

Mr. Orr: Read the question, please.

(The reporter read the question.)

A. Practically all our sales have been to department stores and some gift shops.

The Court: Are you familiar with your market in England on these dolls?

(Testimony of Allan L. Rowland.)

A. Harridge's—we were selling them to Harridge's.

Q. One individual?

A. Yes, the only store we had.

Q. Approximately how many have you sold?

A. In the last couple of years we haven't been able to sell on account of the devaluation of the pound sterling. They had a certain limited amount but now it is questionable. We were [176] selling about a thousand dollars a year to them.

Q. I will direct your attention to a group of records which have been produced by your organization in various proceedings in the past and ask if you recognize what they are.

A. Yes, sir, they are our invoices covering the sale of merchandise for the various stores.

Q. And do you recall the reason for turning those records over to your counsel?

A. For the purpose of establishing identification and use of certain marks.

Q. And are those typical of your records of sales of dolls during the early days of your organization?

A. Yes, sir.

Q. And they are records that were taken from your regular files?

A. Yes, sir.

Q. For the purpose of use as testimony?

A. Yes, sir.

Q. In connection with your testimony?

A. Yes, sir.

Mr. Orr: I would like to offer the group just

(Testimony of Allan L. Rowland.)

referred to as Defendant's Exhibit D, Exhibit D being——

The Court: Do you want to make them all one exhibit?

Mr. Orr: Make them D but with successive numbers.

The Court: Very well. [177]

Mr. Orr: So that the group will appear as Exhibit D with the suffixes, Exhibit D being an invoice sold J. L. Hudson Company, Detroit, Michigan, under date of 6/17/36;

As D-1 an invoice of the Nancy Ann Dressed Dolls to the Toy Shop, Inc., 1329 Fifth Avenue, Seattle, Washington, date 8/6/36;

An invoice to S. S. Weisman, 617 Texas Street, Shreveport, Louisiana, date 8/28/36 as D-2;

As D-3 an invoice of Nancy Ann Dressed Dolls to J. K. Gill Company, Portland, Oregon, date 9/1/36;

As D-4 an invoice of Nancy Ann Dressed Dolls to L. Bamberger & Company, Newark, New Jersey, date 11/9/36;

As D-5 an invoice of Nancy Ann Dressed Dolls, Inc., to Fred Harvey, Union Station, Kansas City, Missouri, date 3/21/38;

Next an invoice of Nancy Ann Dressed Dolls, Inc., to Cash Wholesale Company in Little Rock, Arkansas, date 4/16/40, (D-6).

Next an invoice from Nancy Ann Dressed Dolls, Inc., to Carl's, San Antonio, Texas, date May 28, 1941, (D-7);

(Testimony of Allan L. Rowland.)

Next an invoice, Nancy Ann Dressed Dolls, Inc., to Miller & Paine, Inc., Lincoln, Nebraska, date August 12, 1941, (D-8);

Next an invoice, Nancy Ann Dressed Dolls, Inc., to Loveman, Joseph & Loeb, Birmingham, Alabama, date August 15, 1941, (D-9);

Next an invoice of Nancy Ann Dressed Dolls, Inc., to Younker Bros., Inc., Des Moines, Iowa, date March 17, 1942, (D-10);

Next an invoice, Nancy Ann Dressed Dolls, Inc., to Milwaukee [178] Boston Store, date March 17, 1942 (D-11);

Next an invoice, Nancy Ann Dressed Dolls, Inc., to H. C. Capwell Company, Oakland, California, date October 29, 1942, (D-12);

Next an invoice of Nancy Ann Dressed Dolls to Logan's Sports Wear, Logan, Utah, date June 11, 1943, (D-13);

Next an invoice to the Paris Company, Salt Lake City, Utah, date August 30, 1943, (D-14);

Next an invoice to F. A. O. Schwarz, 745 Fifth Avenue, New York, New York, date April 17, 1944, (D-15);

Next an invoice from Nancy Ann Dressed Dolls to Wieboldt Stores, Inc., Oak Park, Illinois, date May 12, 1944, (D-17);

An invoice, Nancy Ann Dressed Dolls, Inc., to The Dayton Company, Minneapolis, Minnesota, date March 16, 1942, (D-18);

An invoice, Nancy Ann Dressed Dolls, Inc., to

(Testimony of Allan L. Rowland.)

Halliburtons, Oklahoma City, Oklahoma, date February 27, 1942, (D-19) ;

Next an invoice, Nancy Ann Dressed Dolls to the Higbee Company, Cleveland, Ohio, date January 17, 1945, (D-20) ;

Next an invoice to The Emporium, San Francisco, date January 31, 1945, (D-21) ;

And finally an invoice from Kaufmann's Fifth Avenue, Pittsburgh, Pennsylvania, date May 23, 1945, (D-22) ;

(The invoices were marked respectively as indicated, in evidence.)

Q. (By Mr. Orr): I will hand you one of the invoices just [179] identified as Defendant's Exhibit D-9, and call your attention to the fact that it comprises several sheets. Will you explain, briefly, what those several sheets are?

A. The first sheet is the office copy of invoice, bearing the date and the address, order number, department number, and the salesman and the commodity which was shipped.

The second one is the Railway Express receipt, signed receipt, indicating it was picked up by Railway Express on the same day, shipped to the customer.

The third piece of paper is the factory copy which is marked by the shipping clerk showing how it was shipped, the date it was shipped, and the number of cartons.

The last two pages are merely the worksheet of the original order—our worksheet.

Q. Is that arrangement and grouping of sheets

(Testimony of Allan L. Rowland.)

common to the several invoices and groups of papers that we have introduced here?

A. Yes, sir.

Q. That is in accordance with your general practice? A. Yes.

Q. Is there anything by which the shipping receipts and factory number orders are coordinated with the top sheet so that they know that it all relates to the same transaction?

A. Yes, the invoice number is on the edge of both the office copy and the factory copy; it is written on the bill of lading, [180] and there is nothing on the worksheet to indicate it.

Q. But as to each of these transactions, then the presence of a shipping receipt and your factory copy indicate that the goods have been shipped?

A. Yes, sir.

Q. I ask you to produce for me a group of records indicating typical sales of your organization during the past few years as indicating the quantity and the wide territory which you have, the quantity that you have sold, and the territory that you have shipped them to. Will you identify the group that I have just handed you?

A. Yes, sir.

Q. What are they?

A. They are invoices to the various stores throughout the United States. This happens to be a group of various dates but all being the same amount in dollars and cents due to the fact that these were printed rather than being typed. In

(Testimony of Allan L. Rowland.)

other words, the invoices were printed ahead of time and when we ship anybody two units or five units or 36 units, the invoices were printed ahead of time to save the billing expenses and time.

Q. Will you explain, briefly, what that unit system billing orders is?

A. The unit came about during the war when we only had a limited amount of merchandise. Rather than give all of one [181] number to one store, we decided the best thing to do was to make an equal distribution. So, therefore, we organized the unit, which comprised at that time, I believe, about 75 dolls, and we sold the merchandise in a unit packed at \$75 for around 70 dolls, and these invoices happen to be all of the 36 unit pack.

Q. And you had printed up invoices for different numbers of units per sale?

A. Yes. This happened to be the highest one of the ones we had for convenience in shipping.

Q. These are records you have taken from the records of your company?

A. Yes.

Q. Will you explain whether you have attached to these shipping and factory records that correspond?

A. They should be complete. They are. There are some cancelled ones in there, too, but as a whole, they are complete with the bills of lading and the office copy.

Mr. Orr: I will offer in evidence the group of invoices and attached papers just identified by the witness, and ask that they be identified as Defend-

(Testimony of Allan L. Rowland.)

ant's Exhibit E, with the invoices numbered successively from E, E-1, E-2 through, and I would like to identify them on the record.

The Court: Why can't the last offer be admitted as one exhibit? [182]

Mr. Orr: As one exhibit, as Exhibit E, the exhibit comprising invoices to the following individuals.

The Witness: Mr. Orr, that isn't a shipment, that top one; that is an order.

Mr. Orr: William Filene's Sons & Co., Boston, Massachusetts, dated October 29, 1947;

An order to The Dayton Company, Minneapolis, Minnesota, dated October 24, 1947;

An invoice to Bullock's, Broadway and Hill and 7th Streets, Los Angeles, October 23, 1947;

Invoice to the Broadway Department Store, Los Angeles, dated October 22, 1947;

Invoice to Famous-Barr Company, St. Louis, Missouri, no date, invoice No. 87225;

Invoice to The Paris Company Department Store, Salt Lake City, Utah, no date, invoice No. 87224;

Invoice to Famous-Barr Company, St. Louis, Missouri, date September 30, 1947; invoice No. 87223;

Invoice to The Dayton Company, Minneapolis, Minnesota, date October 8, 1947, invoice 87222;

Invoice to the Famous-Barr Company, St. Louis, Missouri, date September 3, 1947;

Invoice to Marshall Field & Company, date September 5, 1947, invoice 87220;

(Testimony of Allan L. Rowland.)

Invoice to Jordan Marsh Company, Boston, Massachusetts, [183] date September 4, 1947, invoice No. 87219;

Invoice to Milwaukee Boston Store, Inc., date August 29, 1947, invoice No. 87218;

Invoice to Kaufmann's, Fifth Avenue, Pittsburgh, Pennsylvania, dated August 18, 1947, invoice 87217;

Invoice to Wieboldt Stores, Inc., Oak Park, Illinois, dated August 11, 1947, invoice No. 87216;

Invoice to Wieboldt Stores, Evanston, Illinois, date August 20, 1947, invoice No. 87215;

Invoice to Wieboldt Stores, Inc., of Chicago, Illinois, 63rd and Green Streets, date August 12, 1947, invoice No. 87214;

Invoice to Wieboldt Stores, Inc., Lincoln School and Ashland Avenue, Chicago, date August 18, 1947, invoice No. 87213;

Invoice to The Halle Bros. Co., 1228 Euclid Avenue, Cleveland, date August 12, 1947, invoice No. 87212;

An invoice to The Dayton Company, Minneapolis, Minnesota, dated August 7, 1947, invoice No. 87211;

An invoice to Stix-Baer & Fuller Co., 603 Washington Avenue, St. Louis, Missouri, date August 7, 1947, invoice No. 87210;

Invoice to Marshall Field & Company, 121 North State Street, Chicago, date July 21, 1947, invoice No. 87209;

Invoice to Gimbel Bros., 33rd Street and Broad-

(Testimony of Allan L. Rowland.)

way, New York, New York, date July 25, 1947, invoice No. 87208; [184]

Invoice to Marshall Field & Company, 121 North State Street, Chicago, June 16, 1947, invoice No. 87207;

Invoice to Bullock's, Los Angeles, California, date June 6, 1947, invoice No. 87206;

Invoice to F. A. O. Schwarz, 745 Fifth Avenue, New York, New York, date May 29, 1947, invoice No. 87205;

Invoice to The Dayton Company, Minneapolis, Minnesota, date May 15, 1947, invoice No. 87204;

Invoice to Bullock's, Broadway, Hill and 7th, Los Angeles, date April 7, 1947, invoice No. 87203;

Invoice to Dennison Manufacturing Company, 411 Fifth Avenue, New York, New York, date April 10, 1947, invoice 87202;

And an invoice to Famous-Barr Company, Olive, Locust, 6th and 7th, St. Louis, Missouri, date April 11, 1948, invoice No. 87201.

The Clerk: The group is marked Defendant's Exhibit E in evidence.

(Group of invoices listed above was thereupon marked Defendant's Exhibit E in evidence.)

Q. (By Mr. Orr): That group of invoices, of course, does not begin to represent the total number that you have in your records? A. No, sir.

Q. I will hand you a slip of paper which you handed me with the group of documents and ask you if you can identify that. [185]

(Testimony of Allan L. Rowland.)

A. That is an order from the May Company of Los Angeles.

Q. Will you explain that?

A. Dated January 2, 1947, for 50,108 dolls. That is probably one of the largest doll orders placed in the United States.

Q. That was the Nancy Ann Storybook Doll?

A. Nancy Ann Dolls, for shipment as per the usual orders.

Q. What were the usual orders? What would they indicate by "usual orders"?

A. Their usual orders were about four to eight thousand dollars a week.

Mr. Orr: I will ask that the order slip just identified by the witness be placed in evidence as defendant's exhibit next in order.

The Court: Let it be admitted and marked.

The Clerk: Defendant's Exhibit F in evidence.

(Order slip referred to was thereupon marked Defendant's Exhibit F in evidence.)

Q. (By Mr. Orr): Have you a tabulation of any kind that would give an approximation of the volume of sales which you have had during the period of the Nancy Ann organization?

A. Yes, sir, I have. I have it in dollars and cents, and a rough estimate indicates we have manufactured approximately ten million dollars since the inception in 1937.

Q. What is the tabulation that you have prepared?

A. \$8,744,384.97. [186]

(Testimony of Allan L. Rowland.)

Q. How was that tabulated? A. By years.

Q. By years?

A. Yes, sir, starting at \$16,000 for 1937, and then on up to 1949 there was a million and a half in sales.

The Court: In dollars?

A. Yes.

The Court: No wonder you looked so prosperous.

Q. (By Mr. Orr): Has the tabulation which you have prepared been made up from the figures taken from your official records? A. Yes, sir.

Q. And they truly represent the business done through these respective years? A. Yes.

Mr. Orr: I will ask that the tabulation which the witness has prepared and identified be introduced in evidence as Defendant's Exhibit G.

The Court: Let it be marked.

(The tabulation referred to was thereupon marked Defendant's Exhibit G, in evidence.)

The Court: You are familiar with your marketing problem. In all of these years have you marketed \$5,000 worth of your dolls in Europe?

A. In Europe?

Q. Yes. [187] A. No, sir.

Q. Did you market a thousand dollars' worth?

A. Yes, we could now.

Q. But did you?

A. No. In England we did around a thousand

(Testimony of Allan L. Rowland.)

dollars a year prior to the war years; Johannesburg, South Africa, we had about a thousand dollars.

The Court: You are getting off the beam. I was over this territory; I am anxious to know.

A. No, there is no demand for American dolls in Europe like there is in this country.

Q. Not at any time? A. Not most of it.

Q. At all? A. Probably by tourists.

The Court: They put us to shame here.

The Witness: Prior to the war.

The Court: I say that kindly.

The Witness: Prior to the war, the First World War.

The Court: I am talking about my own experience, recently. Everything over there is hand-made with a character and human touch that I never saw anything equal.

Mr. Orr: You should look over Nancy Ann dolls, your Honor.

The Court: I have seen Nancy Ann [188] dolls——

The Witness: We make ten thousand a day, Judge.

The Court: That is all right if you make ten million. That is the point I am making. I was wondering in my own mind, which has very little to do with the merits of this case, how you could go into a market of that kind, and make very much headway. You may go to South Africa and do it because it is off the beaten path, but every-

(Testimony of Allan L. Rowland.)

where in Europe they are so industrious when they are doing nothing else they are making dolls.

The Witness: Maybe we should move.

The Court: What is that?

The Witness: Maybe we should move.

The Court: I am very interested; I don't see how there would be a market for any.

The Witness: There was only a market in Har-ridge's in London.

The Court: The group I was with bought them in London and found they could do better there than anywhere else. Of course they had bought them in the States. Maybe that will help your business along. I am giving you the benefit of my opinion.

The Witness: Thank you.

Q. (By Mr. Orr): During the years you have been in this business, Mr. Rowland, has your organization issued price lists of the dolls which you have developed? A. Yes, sir, they have. [189]

The Court: Issued what?

Mr. Orr: Price lists.

The Court: Can't we get a stipulation on this line of testimony? I think it can be covered by stipulation; there is no question about that.

Mr. Mellin: I am not questioning it. In fact, to prove title we had already stipulated, so I let him go on.

Mr. Orr: I am doing this for two reasons; there is more than just the question of validity of trade-marks, there is the issue of unfair competition, and

(Testimony of Allan L. Rowland.)

there is the possibility that the question of secondary meaning may arise, and to sustain a ruling on the secondary meaning issue, it is necessary to have a showing of substantial use and long continued use. And I have gone to the trouble of putting in this long list of typical sales records to show that there have been extensive sales throughout the country since 1937.

The Court: That is simply answered by indicating you had done ten million dollars' worth of business.

Mr. Orr: It simply shows it in dollars and cents.

The Court: There isn't any question——

Mr. Mellin: Except to this extent; Only about ten per cent is attributable to the dolls involved here; the only 90 per cent is attributable to some other dolls, as is evidenced from the first invoice.

The Court: I understand; I mean the business on the whole. [190]

Mr. Mellin: On the whole, yes. It is only material as far as it extends to the dolls in issue.

Mr. Orr: If I may have the witness identify them as price lists which have been issued year by year by his company, then I will offer the entire group as one exhibit.

The Court: Very well.

The Witness: Yes. These are the price lists that have been issued from 1937 to the present one, 1950.

The Court: What are those?

A. Price lists.

(Testimony of Allan L. Rowland.)

The Court: Of what?

A. Of the "Storybook" dolls.

Mr. Orr: Listing the dolls, with the prices at which they are sold. Would your Honor care to look at the current one?

The Court: The purpose of this was not to give me the photograph of this young lady, was it?

Mr. Orr: That is secondary to its primary purpose.

The Court: That is all right.

Mr. Orr: I will ask that the group of price lists identified by the witness be placed in evidence as defendant's next in order with the 1937 price list given the primary letter H and the years following that numbered 1 on in order.

(Price lists referred to were thereupon marked Defendant's Exhibits H, H-1 to H-14, inclusive, respectively.)

The Court: May I inquire how many years ago this picture [191] was taken?

Miss Abbott: It was taken about, I think, less than a year ago.

The Court: You look like a young lady of 18.

Miss Abbott: Well, I photograph a little better than I look, sometimes known as photogenic.

Mr. Orr: I notice that there are two separate price lists for 1950. Can you explain that?

A. Yes, the first price list for 1950 were dolls with opened eyes; since that time we have brought out sleeping-eye dolls.

(Testimony of Allan L. Rowland.)

The Court: How long have they been on the market?

A. We brought them out at the Fair, the Toy Fair in March.

Q. March of this year? A. Yes, sir.

The Court: They have them over in Europe. I brought one of them back.

Miss Abbott: Germany had them for some years, small dolls.

The Court: I will bring you up to date on dolls. I brought one back with me.

Mr. Orr: Did they bear trade-marks resembling those of Nancy Ann?

The Court: I didn't pay any attention to that part of it.

Mr. Orr: That is the important thing we are concerned with.

The Court: Moving eyes. In fact, my youngster that I [192] brought it back for didn't discover it for quite a while. We had it half an hour and we discovered it in half an hour that the eyes were moving.

Mr. Orr: I am about to go into a different line of interrogation.

The Court: That indicates to me clearly that you would like to have a recess.

Mr. Orr: I thought perhaps your Honor would like to take a short recess.

The Court: I will accommodate you. All right, we will take a recess.

(Recess.)

(Testimony of Allan L. Rowland.)

Q. (By Mr. Orr): Before the recess when we were discussing the tabulation of production figures which you had produced, I believe counsel made a statement that the total part involved here was only one-tenth of the number that would be represented on this statement. What can you say with regard to that statement?

A. That is so much in error; the whole thing represents "Storybook" dolls, the whole figure.

Q. "Storybook" dolls, all of them?

A. Yes.

Q. How about some of the others?

A. The others, about 50 or 60 per cent of them are nursery rhyme and fairy tale, and the rest—— [193]

Q. How about the fairy tale? Is that included in the 60 per cent? A. Yes.

Q. What can you say as to the sales of nursery rhyme and fairyland sales?

A. An actual tabulation would probably show that they are very much larger than the other dolls; in other words, fairy-tale and nursery-rhyme dolls and the Mother Goose series are the most popular; probably they sell about, on the Mother Goose series, they sell on the ratio of about 18 to 1.

Q. Have you done any extensive advertising during the period that you have been in business?

A. None whatsoever.

Q. Has any advertising been done in your behalf?

A. Yes, practically every store in the United

(Testimony of Allan L. Rowland.)

States, including Time Magazine and Glamor Magazine and a number of publications.

Q. Do you have any approximation of the amount of advertising that has been done in your behalf in the various stores?

A. That would have been impossible to estimate.

Q. (By Mr. Mellin): Did I hear you say that every store in the United States advertised it?

A. Practically, I said.

Q. Meaning department stores, I suppose, of the higher class? A. Yes. [194]

Q. (By Mr. Orr): I asked you to produce a few typical advertisements that have been used to advertise the Nancy Ann Storybook Dolls. Will you glance at the group that I have handed you and tell me what those are?

A. These are part of our clippings that we have been saving for a scrapbook at various times, the City of Paris ad. There are different ads all put on by the department stores.

Q. Those are actual clippings from newspaper publications throughout the country?

A. Yes, sir, the name of the newspaper is on top, and the date. We have a special girl doing nothing but that all the time.

Mr. Orr: I will ask that the group of advertising clippings identified by the witness be entered in evidence as Defendant's Exhibit I with the individual ads not given numerical suffixes.

The Court: It may be admitted and marked.

The Clerk: Defendant's Exhibit I.

(Testimony of Allan L. Rowland.)

(Newspaper clippings were thereupon marked Defendant's Exhibit I in evidence.)

Q. (By Mr. Orr): Has that practice of making clippings and preserving advertisements of "Story-book" dolls been continued through the years?

A. Yes, sir, it has.

Q. During the course of some of these opposition and Patent [195] Office proceedings, have you been asked to produce typical clippings from time to time?

A. Yes, sir.

Q. I will hand you a folder of clippings and ask you if you recognize what those clippings are.

A. They are clippings out of our scrapbook.

Q. Can you give me the approximate dates of some of them?

A. These here—unfortunately, these don't seem to have the dates on them. No, it is only some cases—this has July 5, 1940, on this particular one. There is no indication of the date on that. There only seems to be about one that actually has the date on it. Here is one in 1941, part of the Examiner. Here is from the Toys and Bicycles, June issue of—it doesn't show—just the June issue.

Q. Those are clippings—

A. Here is the Examiner, 1941, and this is from the Vallejo Times in September, 1945.

Mr. Orr: I will ask that the group of clippings just identified by the witness be admitted in evidence as Defendant's Exhibit J.

The Court: It may be admitted.

(Testimony of Allan L. Rowland.)

Mr. Orr: With the individual ads given numerical suffixes in order.

The Clerk: J, J-1, J-2, J-3, J-4, J-5.

(The clippings referred to were marked Defendant's [196] Exhibits J, J-1 through J-5, inclusive, in evidence.)

Q. (By Mr. Orr): When did the practice of the Dollcraft Co. of applying the names of Red Riding Hood, Sugar and Spice, and various of your names to their products come to your attention?

A. In the latter part of last year when Macy's ran that ad, which was about in October.

Q. I will call your attention to the advertisement which has been offered here as Plaintiff's Exhibit 46 and ask if that is the advertisement you refer to.

A. Yes, sir.

Q. Where in the advertisement did you find the designation of any doll or dolls that you considered to infringe your trade-mark rights?

A. Well, they have the ad here, "Exclusive Bisque Story Dolls"; also they have listed "Red Riding Hood," "Little Bo-Peep," and "Sugar and Spice."

The Court: Let me see it.

(The exhibit was handed to the Court.)

Q. (By Mr. Orr): I will call your attention to an advertisement appearing in the Vallejo News Chronicle dated Monday, November 21, 1949, and ask if that is an advertisement that came to your attention.

(Testimony of Allan L. Rowland.)

A. Yes, sir, this advertises new story book dolls encased in bottles, real bisque heads, real hair.

Q. What word or words in the advertisement do you find [197] objectionable?

A. Story book dolls.

Mr. Orr: I will ask that the advertisement just identified by the witness be marked as Defendant's exhibit next in order.

The Court: Let it be admitted and marked.

The Clerk: Defendant's Exhibit K in evidence.

(The advertisement referred to was thereupon marked Defendant's Exhibit K in evidence.)

Q. (By Mr. Orr): Following your observation of this advertisement, what, if anything, did you do? Did you check any other stores?

A. Yes, we checked a number of stores around town.

Q. What did you find?

A. Well, we found them being sold in meat markets and 15-cent stores, a liquor store out on 16th and Mission; then we advised counsel to take appropriate action on it.

Q. Have you any information as to whether such action was taken?

A. Yes, sir, it was.

Q. And that was a matter of sending notices of infringement, I assume?

A. That is right.

Q. Did you purchase any of the dolls which are noted in these advertisements? [198]

A. Yes, sir, I had them purchased.

(Testimony of Allan L. Rowland.)

Q. I will direct your attention to three bottled dolls, one bearing the number 201, "Red Riding Hood," another bearing the number 211, "Sugar and Spice," and a third one bearing the number 203, "Little Bo-Peep," and ask if those are the dolls that you had purchased for you following your observation of that advertisement.

A. Yes, sir.

Q. Where were they purchased?

A. They were purchased at Macy's.

Q. They were purchased at your request?

A. Yes, sir.

Q. What transpired at the time those purchases were made? What did they ask for?

Mr. Mellin: Just a moment, please. If your Honor please, we are now calling for hearsay unless this witness was present and heard what was asked for. I object to the testimony as being completely hearsay.

The Court: Objection sustained.

Q. (By Mr. Orr): Who purchased the dolls?

A. There was three different individuals purchased them.

Q. Did you purchase any yourself?

A. No, sir, I did not.

Q. Are those who purchased them in court today?

A. No, sir, they are not. [199]

The Court: How do you get those out of the bottle?

A. I don't know; you have to shake them.

Mr. Morr: Have you purchased——

(Testimony of Allan L. Rowland.)

The Court: I have made an inquiry: How do you get those dolls out of the bottle?

Mr. Mellin: Just take the lid off and they come out, pull it out by the metal lid—just by the metal insert.

(Demonstrating.)

The Court: I am ahead of you.

Gentleman in the Courtroom: The trick is to get it in again. They are just fastened.

The Court: I want you to put it back now.

(The gentleman demonstrated.)

The Court: You can buy twelve of these at a time if you want?

The Gentleman: Yes.

The Court: That would be twelve times two, \$24.00.

The Gentleman: \$1.95.

The Court: If you bought twelve of them?

Mr. Mellin: \$10.20.

Mr. Orr: Do you have the sales receipts that were——

Mr. Mellin: We will put it back. He is going to put it back in. He will give it to the Clerk.

Mr. Orr: I will appropriate this one instead.

The Court: That was all my fault. [200]

Mr. Mellin: May I see those?

(Papers handed to Mr. Mellin.)

Q. (By Mr. Orr): Have you the sales receipts

(Testimony of Allan L. Rowland.)

that were issued at the time those purchases were made? A. Yes, sir.

The Court: Which is this?

Mr. Orr: Sales receipts for the purchases of the dolls just identified by number.

The Court: If he didn't purchase them——

Mr. Mellin: Your Honor, I was just going to object that we have no way of determining whether or not those sales receipts were attached to that sale or purchase.

The Court: Who purchased them?

Mr. Mellin: Besides, they are not binding on us. Anyway, we will stipulate that those dolls were purchased by them from Macy's, but this witness can not testify that that receipt was received at the time.

Mr. Orr: You will stipulate that the dolls were sold by Macy's to agents of the defendant?

Mr. Mellin: That is correct, your Honor.

Mr. Orr: Very well. Thank you.

Mr. Mellin: Sold by Macy's to agents of the defendant.

Q. (By Mr. Orr): Are you acquainted with the individual plaintiff Kerr? A. Yes, sir. [201]

Q. What is your acquaintance with him?

A. What is my what?

Q. What is your former acquaintance with him?

A. Well, I first met him on the golf course, he was a caddie out there, and I put him to work. That was—I just don't know the exact date; it was about 1939 or 1940.

Q. In the plant of your company?

(Testimony of Allan L. Rowland.)

A. Yes, sir, and he was doing part-time work for us and then working on the golf course as a caddie out there. Later on we put him on steady and he became shipping clerk.

Q. How long was he with your organization?

A. Oh, I would say approximately four years.

Q. During that time were his activities confined to any particular part of the plant?

A. Well, Bob had pretty much—Mr. Kerr had pretty much the run of the plant. He was shipping clerk, receiving clerk, had complete information on where we bought all our materials, who we bought them from, how we bought them. Later on he did considerable writing up of orders for material that Nancy wanted ordered. He had a desk in the office in later years and had pretty much the run of the whole organization.

Q. Did he have access or acquaintance with the customers to whom your products were being shipped?

A. Well, he knew them—naturally being shipping clerk, he knew who they were going to, what stores, yes, sir. [202]

Q. Did he have any duties that would call him into the actual plant itself where the dolls were being dressed?

A. Yes, sir, he was through the plant all day at all times.

Q. Did he have opportunity to become familiar with the methods of assembling and dressing dolls?

A. Oh, yes, naturally in the plant all day long,

(Testimony of Allan L. Rowland.)

he acquires a certain amount of information, but it is more or less that type of information that most anybody knows how to do it or knows how it is done, but they don't know the why-for and whereas that they do certain little shortcuts, that's all.

Q. Could he have occupied his position and performed his duties without being familiar with the trade-marks which were applied to your various doll products?

A. No, he couldn't. He was wideawake, he knew what was going on in the plant all the time, and he was familiar with everything that happened there.

Q. He would more or less necessarily know what trade-marks were in use, wouldn't he?

A. That is right.

Q. Are you acquainted with the individual plaintiff Hinz?

A. Yes, sir.

Q. What has been your business connection with him, if any?

A. Well, we were making bisque dolls. That is a clay substance—across the Bay; at least we were having them made, and the two individuals making them just couldn't produce enough, [203] so through contacts—I believe it was through my brother-in-law that we contacted Mr. Hinz, who was making clay dolls in Santa Clara, and after several conferences, why, he agreed to make the dolls for us. And this went on for a period of years. Hinz' dolls were never satisfactory for our product because of the fact—the clay that was used, and we afterwards bought a plant in Stockton and we decided to make

(Testimony of Allan L. Rowland.)

our own dolls. And Mr. Hinz was very much put out about the fact that we were going to make our own dolls and we closed the deal with him.

Q. You paid for the dolls that you had ordered from him?

A. Yes, sir, we settled up at the end, presumably to everybody's satisfaction.

Q. For a period he did serve you, he did supply you dolls to meet your needs, is that right?

A. Yes, sir.

Q. Have you had any business dealings with him since——

A. No, sir.

Q. ——the purchase of the doll bodies was discontinued?

A. No, sir.

Q. When did you first know of an organization making dolls under the name of Dollcraft?

A. Oh, three or four years ago it was called to our attention through the business agent. He asked us if we knew about this outfit making Globetrotter dolls.

Q. At that time did you have shown to you a folder such as is [204] here in evidence as Plaintiff's Exhibit 20?

A. Yes, I believe one of our customers sent it in to us, calling our attention to the fact that somebody in San Francisco was making dolls besides ourselves.

Q. Did you find on that exhibit any use of the names of your various dolls which you thought objectionable?

A. No, there were none on this list at all.

Q. How about the "Fairylend" series?

(Testimony of Allan L. Rowland.)

A. Well, I didn't particularly notice it any more than I noticed it now, just numbers; it looks like something has been left off and not been used.

Q. In connection with the dolls which you had purchased for you from Macy's following the publication of this ad, did you find a folder listing the dolls?

A. Yes, sir.

Q. Is the folder identified here as Plaintiff's Exhibit 29 a folder of the kind you refer to?

A. Yes, sir, it is.

Q. Do you find in that folder a listing of any of the names of the trade-marks that you have registered?

A. Yes, sir, in the "Fairyland" series, "Red Riding Hood," "Miss Muffett," "Little Bo-Peep," "Mistress Mary," "Little Miss Donnett," "Curly Locks," "Goldilocks" and "Sugar and Spice."

Q. What has been your policy with respect to the protecting of your trade-mark rights? [205]

A. Well, we have always considered that they were awarded to us by the Patent Office and as such, why, we were going to do everything possible to take legal action and protect our rights.

Q. And have you during the course of the past ten or fifteen years had any litigation involving others?

A. Yes.

Q. In connection with your marks?

A. Yes, sir, we have been successful in stopping and opposing quite a few registrations, such as "Hollywood Storybook" and "Hollywood Book Doll," and also "Goldie Doll" and "Birthstone Doll

(Testimony of Allan L. Rowland.)

of the Month," and there were a few others that I can't just recall at the present time.

Q. Did you ever come in conflict with Mr. Ippolito with regard to the mark "Mary, Mary, Quite Contrary"? A. Yes, sir.

Q. You opposed registration on that mark, did you? A. Yes, sir.

Q. How did that come out?

A. That was—we successfully opposed it.

Q. Did you ever have any conflict with respect to the mark "Little Miss Muffett"?

A. Yes, sir, we——

Q. What was the nature of that?

A. We successfully opposed that against one of the clothing manufacturers. [206]

Q. In connection with your own registration of "Little Miss Muffett," did you encounter any difficulty? Was it opposed by any other user?

A. No, I believe not.

Q. Referring particularly to the use of "Mary Muffett Tie," by Mary Muffett, Inc., do you recall that? A. That's right.

Q. What was the outcome of that?

A. The outcome of that was that we were successful in registering the "Miss Muffett."

Q. In connection with the difficulty that you have had from time to time with Ippolito and the Hollywood Doll Company, what was the final outcome of that dispute?

A. Well, a settlement out of court whereby he

(Testimony of Allan L. Rowland.)

backed away from the numbers that he was attempting to register.

Mr. Mellin: Just a minute, your Honor. I understand it is a written agreement. Unless that is produced, I am going to object to any testimony because apparently there was a division of spoils in that situation, one got one group and the other another. Unless that whole matter is brought up, I am going to object to any oral testimony from this testimony as to what actually occurred.

The Court: Is there a written document available, counsel?

Mr. Mellin: I was going to offer in evidence a certified copy of the judgment that was entered in that proceeding. With [207] that judgment, your Honor, I understand there was a copy of the agreement by which that judgment was entered into. That one we haven't been able to obtain.

Mr. Orr: The judgment indicates the action taken by the Court. The settlement agreement is not a matter of court record, and I see no reason for producing it.

Mr. Mellin: That is just exactly why we want it.

The Court: If this testimony goes into the record, if it available, it will have to be produced.

Mr. Orr: It is merely to indicate that the proceeding was terminated and that the validity of the marks here involved was conceded.

The Court: It is predicated on an agreement; you can't offer part of it unless the whole goes in.

Mr. Mellin: As a matter of fact, I make demand

on counsel now through the Court for that agreement showing unfair competition and a division of the spoils here.

Mr. Orr: At this time, your Honor, I would like to ask for a recess in order that I might produce the witnesses who purchased the dolls and that I can consider the matter of producing the agreement in connection with the judgment which I had proposed to introduce.

Mr. Mellin: If your Honor please, the other witnesses have no right—I still have this one to cross-examine.

Mr. Orr: If we recess until tomorrow morning, you will [208] have ample opportunity. I have only a very few more questions to ask this witness.

The Court: What will we do about it?

Mr. Mellin: If your Honor please, I am not trying to hold counsel here on that excuse of bringing other witnesses. It is a little bit early for the recess. I realize if you have over night you can ask a lot more questions, and the proceeding is getting unduly lengthy.

Mr. Orr: I would like to continue my further examination of Mr. Rowland until I myself determine whether we can put in the agreement. I have a number of questions which will hinge upon the production of that agreement and the determination, and I am not prepared to offer it at the present time, and I don't want to continue this examination until I have reached that determination. Since it is almost 4:00 o'clock, I am asking that the Court recess until tomorrow morning, at which time we can continue.

The Court: Will you join, counsel, in that motion?

Mr. Mellin: Yes, your Honor.

The Court: Very well; we will take an adjournment until ten o'clock tomorrow morning.

(Thereupon an adjournment was taken to tomorrow, Wednesday, August 23, 1950, at 10:00 o'clock a.m.) [209]

Wednesday, August 23, 1950, 10:00 A.M.

The Clerk: Dollcraft Co. vs. Nancy Ann Storybook Dolls, on trial.

Mr. Mellin: Ready.

Mr. Orr: Ready.

The Court: Proceed.

Mr. Orr: At this time, your Honor, I would like to ask leave to interrupt taking of testimony of Mr. Rowland and put on the stand two witnesses who purchased the dolls that we discussed yesterday afternoon, Mr. Giordano and the lady who bought them. If I may interrupt at this time, I will put them on out of order.

Mr. Mellin: I would prefer to cross-examine Mr. Rowland on that line first.

The Court: Let's conclude with the witness on the stand.

Mr. Orr: But I hadn't completed my examination of Mr. Rowland. I thought you gave me leave to bring——

The Court: No. Let us proceed.

Mr. Mellin: If your Honor please, it may not be of too much importance for me to inconvenience

the witnesses. If it is only going to be very short, I will withdraw my objection.

Mr. Orr: These two witnesses are away from their employment; I promised to get them back as soon as I could. It won't take but a very few minutes. [210]

The Court: Very well.

ALBERT GIORDANO

called for the defendant; sworn.

The Clerk: Would you state your name to the Court? A. Albert Giordano.

The Clerk: Where do you live?

A. South San Francisco.

Q. What is your business or occupation?

A. I am assistant buyer at the City of Paris.

Q. How long have you been?

A. Four years.

Q. City of Paris? A. Yes.

Direct Examination

By Mr. Orr:

Q. Are you acquainted with Mr. Rowland of the Nancy Ann Storybook Doll Company?

A. Yes, I am.

Q. Did you ever have any conversation with him with reference to dolls which were advertised by Macy's last fall? A. Not directly.

Q. What, if any, connection have you had with the purchase of dolls from Macy's?

A. Well, Mr. Daly, who is my immediate superior at the City of Paris, told me that he received a call from Mr. Rowland [211] to go and buy a doll,

(Testimony of Albert Giordano.)

“Storybook” doll at Macy’s. So Mr. Daly in turn asked me to go.

Q. Did you go to Macy’s and buy a doll?

A. Yes, sir, I did.

Q. At that time what did you ask for?

A. I asked for a “Storybook” doll.

Q. And what were you given?

A. I believe one was “Sugar and Spice”; I believe the other one was “Little Bo-Peep.”

Q. I will direct your attention to two bottled dolls here, one bearing the name “Sugar and Spice,” and the other bearing the name “Little Bo-Peep,” and ask if those are the dolls that you purchased.

A. I believe they are.

Q. Did you receive a sales slip at the time you made the purchase? A. Yes, I did.

Q. I will direct your attention to a sales slip of Macy’s dated 10/27, and ask you if you recognize that sales slip. A. Yes, sir, I do.

Q. What item does that sales slip call for?

A. One “Storybook” doll, “Little Bo-Peep,” one “Storybook” doll, “Sugar and Spice.”

Q. What is the price? A. \$1.95. [212]

Q. Who is that sales slip made out to?

A. It is made out to A. Giordano.

Q. That is yourself? A. Yes, sir.

Q. The slip was delivered to you along with the dolls at the time you made your purchase?

A. Yes, sir.

Q. Was that a cash purchase or a charge purchase? A. Cash purchase.

(Testimony of Albert Giordano.)

Q. Did you in turn deliver to Mr. Rowland the two dolls you purchased on this receipt?

A. Yes.

Q. Have you any interest whatsoever in this litigation? A. None whatsoever.

Mr. Orr: That will be all.

The Court: Any questions?

Mr. Orr: Oh, at this time I ask that the sales slip be offered in evidence as Defendant's Exhibit next in order.

The Court: Let it be admitted and marked.

The Clerk: Defendant's Exhibit L in evidence.

(The sales slip referred to was thereupon marked Defendant's Exhibit L in evidence.)

Cross-Examination

By Mr. Mellin:

Q. You were instructed to ask for a "Storybook" doll, were you? [213]

A. Well, Mr. Daly asked me to go to Macy's and buy a "storybook" doll, which I did.

Q. Had you seen the Nancy Ann Dressed Dolls before?

A. Yes, in our store window at times around Christmas.

Q. And you knew that the dolls that you had were manufactured by Nancy Ann Dressed Dolls?

A. I didn't know who they were manufactured by; all I did was buy a "Storybook" doll.

Q. You weren't under any impression that you were buying a doll made by Nancy Ann, Inc.?

(Testimony of Albert Giordano.)

A. Yes, their name itself implies it is made by Nancy Ann.

Q. Are you an old doll fancier?

A. No, sir, I am not.

Q. The only connection you have ever had with dolls is to see the Nancy Ann dolls?

A. No. I am close with the buyer who bought the stuff. I have been associated with her indirectly, I mean, talking with her in the store. We have meetings and we discuss good items, bad items, what to buy, what not to buy. It is a policy of the store to discuss those things.

Q. When you saw the name "Little Bo-Peep," that simply meant a Nancy Ann Dressed Doll?

A. Primarily I went over to buy a Storybook doll, and Mr. Daly asked me to buy these two particular types, which I did.

Q. Did he tell you that they were Dollcraft dolls? [214]

A. Nancy Ann dolls. He didn't describe them other than he asked me to go over and buy two "Storybook" dolls.

Q. Did you see the name "Dollcraft Co., Inc.," on these jars?

A. It didn't interest me in the least.

Q. It didn't interest you. You weren't fussy whose dolls you went in and bought?

A. Sure, because I was just buying for my superior. I have no idea; we don't have any children, so I went out and did what I was told to do.

(Testimony of Albert Giordano.)

Q. Did Mr. Daly tell you why Mr. Rowland wanted you to buy the dolls?

A. Mr. Daly never discussed anything about Mr. Rowland or anybody outside the store.

Q. He didn't tell you to get the dolls of any certain manufacturer?

A. No. All he said was to buy "Storybook" dolls, and that is all.

Q. How did you happen to buy "Little Bo-Peep"?

A. Just as I told you, he asked me to buy these two.

Q. He asked you to buy "Little Bo-Peep"?

A. And "Sugar and Spice" if available.

Q. Have you known Mr. Rowland before?

A. No, I have no dealings with Mr. Rowland. I have seen him in and out of the store occasionally; I presume he has business there. [215]

Q. The City of Paris is a rather large handler of Nancy Ann dolls, isn't that so?

A. Frankly, I don't know if they do handle them now or not, but I know at the time my particular reference was concerned with this, that they did handle them.

Q. When you went and bought the "Storybook" doll, you thought this was another doll made by Nancy Ann?

A. That is how it impressed me. Mr. Daly told me to buy "Storybook" dolls, so I naturally assumed it was a Nancy Ann doll.

(Testimony of Albert Giordano.)

Q. Have you ever talked about dolls with anybody else? A. No.

Mr. Mellin: That is all.

Mr. Orr: That is all. No further questions.

Mr. Mellin: Just a moment. May I ask him one more question?

Mr. Orr: Surely.

The Witness: Do you want me to get back on the stand?

Mr. Mellin: Yes, if you would.

Q. Are you in any way related to Nancy Ann Abbott in court? A. Repeat that.

Q. Are you in any way related by marriage to Miss Abbott who is in court?

A. No, sir, I am not.

Q. Is Mr. Daly who gave you these instructions, to your knowledge [216] any relation to Miss Abbott or has been?

A. I will tell you the truth, sir; Mr. Daly never discusses any of his private affairs.

Q. Don't you know, as a matter of fact, that Mr. Daly was one of Miss Abbott's husbands?

A. I do not. I never discuss those things.

Q. You never knew that?

A. I don't know anything about his private life; it is none of my business.

Mr. Mellin: That is all.

MRS. JACK McIVER

called for the defendant; sworn.

The Clerk: What is your full name?

A. Mrs. Jack McIver.

Q. Where do you reside?

A. San Francisco.

Q. What is your address?

A. 2347 38th Avenue.

Q. Your business or occupation?

A. I work for the United States Department of Agriculture.

The Court: Proceed.

Direct Examination

By Mr. Orr:

Q. Are you acquainted with Mr. Rowland?

A. Yes, I am. [217]

Q. Did you at any time purchase a doll at his request?

A. Not at Mr. Rowland's request, no.

Q. Did you purchase a doll that you gave to Mr. Rowland? A. Yes, I did.

Q. Will you explain the circumstances under which you purchased that doll?

A. My husband is Mr. Rowland's superintendent, and on the day previous to my purchase Macy's had had an ad in the paper advertising these "Story-book" dolls, and Mr. McIver asked me to go down to Macy's and purchase one. I went in and I asked for a "Storybook" doll, and the young lady took me where they were, took me over to them. I wasn't

(Testimony of Mrs. Jack McIver.)

particularly interested in any particular doll, just so I purchased one. I said, "Are these 'Storybook' dolls?" and she said, "Yes." I said, "Are you sure?" She said, "Well, just a minute." She was apparently a new employee and she called one of the girls and asked her and she said yes, they were.

Q. Is this the doll which you purchased?

A. Yes, it is.

Q. What is the name of that doll?

A. "Red Riding Hood."

Q. At the time you made that purchase were you given a receipt of any kind?

A. Yes, it was a cash purchase and I was given a slip which I gave to my husband. [218]

Q. I will show you a cash receipt in the amount of \$2.02 dated October 27. Will you state whether or not that is the receipt you obtained.

A. Yes, that's it.

Q. Written on there are the words "Red Riding Hood, No. 201, A. L. Rowland." Did you put those marks on there? A. No, I did not.

Mr. Orr: That will be all.

Cross-Examination

By Mr. Mellin:

Q. Did I understand you to say that Mr. McIver was an employee—— A. Yes.

Q. ——of Nancy Ann Dressed Dolls?

A. Yes.

Q. How long has he been employed there?

A. Ten or eleven years.

(Testimony of Mrs. Jack McIver.)

Q. You are familiar with the Nancy Ann dolls, of course? A. Yes, sir, I am.

Q. When you were handed this bottle with the name Dollcraft Company, Santa Clara, California, on it, were you under any impression you were getting a Nancy Ann product made by Nancy Ann?

A. I didn't ask for Nancy Ann; I asked for "Storybook," and I knew I wasn't buying a Nancy Ann "Storybook" doll.

Q. You knew you weren't?

A. That's right. [219]

Mr. Mellin: That is all.

Mr. Orr: No further questions.

I will offer at this time the sales slip identified by the witness as the defendant's exhibit next in order.

The Court: It may be admitted and marked.

The Clerk: Defendant's M in evidence.

(The sales slip referred to was thereupon marked Defendant's Exhibit M in evidence.)

ALLAN L. ROWLAND

recalled on behalf of the defendant; previously sworn.

Direct Examination

(Resumed)

By Mr. Orr:

Q. At this time, Mr. Rowland, I will direct your attention to a copy of an instrument entitled "In the District Court of the United States for the Southern District of California, Central Division,

(Testimony of Allan L. Rowland.)

Nancy Ann Storybook Dolls, Inc., plaintiff, vs. Domenick Ippolito, doing business as Hollywood Doll Manufacturing Co., defendant, civil action No. 5191-WM," and entitled "Settlement Agreement and Stipulation re Facts, and for entry of judgment," and ask if you recognize what that instrument is.

A. It is a settlement agreement and stipulation regarding facts and for entry of judgment.

Q. Is that an agreement which you entered into with the opposing party, Domenick Ippolito, in that litigation? [220] A. It is.

Mr. Mellin: May I look at it, Mr. Orr?

(Paper was handed to Mr. Mellin.)

Q. (By Mr. Orr): Is that the settlement agreement upon which the judgment which you discussed in your testimony yesterday was predicated?

A. It is.

Mr. Mellin: May I see the decree?

(Paper was handed to Mr. Mellin.)

Mr. Mellin: If your Honor please, this is a consent judgment in which Judge Mathes has inserted in his own handwriting——

The Court: Judge who?

Mr. Mellin: Judge Mathes in the Southern District: "That as between the parties and for the purposes of this action"—this consent judgment would only be as between the parties there concerned, and would have no bearing and be of no assistance to

(Testimony of Allan L. Rowland.)

this Court, and I object to the introduction of both the agreement and the judgment on the grounds that they are not only incompetent, but completely immaterial and of no force and effect in this court.

Mr. Orr: On the contrary, it constitutes evidence of the recognition of the trade-marks of the defendant in this action by a competitor.

The Court: I will allow it for what it is worth. It goes [221] to the weight of the testimony.

Mr. Orr: I will ask at this time that the copy of the settlement agreement—incidentally, this is a conformed copy, not the original.

Mr. Mellin: If your Honor please, I am going to object unless I have an opportunity to compare the original with it. They must have the original in their possession. I insist upon comparison with the original, and I am going to object to a copy.

Mr. Orr: That will give you ample opportunity to make such comparison.

Mr. Mellin: I object to its entry at this time until that comparison is made.

Mr. Orr: I can give you my assurance and the Court my assurance that it is an exactly conformed copy.

The Court: Subject to check, I will allow it. His legal objection is good.

Mr. Orr: The original I haven't been able to get in my custody so far, but it will be here in the course of the day.

The Clerk: The settlement agreement is marked Defendant's N in evidence.

(Testimony of Allan L. Rowland.)

(Settlement agreement was thereupon marked Defendant's Exhibit N in evidence.)

Mr. Orr: I would like to offer the certified copy of the judgment as defendant's next in order.

The Clerk: Defendant's Exhibit O in evidence. [222]

(Certified copy of judgment was thereupon marked Defendant's Exhibit O in evidence.)

Mr. Orr: In paragraph 1 appearing at the bottom of the judgment, it is stated:

"That as between the parties and for the purposes of this action, each and all of the following trade-marks are owned and have been duly and validly registered by plaintiff, and have been infringed by defendant set forth in Section XI of plaintiff's complaint, by defendant's use of the trade-marks listed in opposition thereto in paragraph XI of plaintiff's complaint."

And on page 2 there appears a list of trade-mark registrations and registration dates.

Q. I will now direct your attention to plaintiff's complaint in the action and to the two lists of trade-marks appearing in two columns, one designated Plaintiff's Trade-marks, and the other designated Defendant's simulated marks. I would like to have you read in the record the marks which are listed in that paragraph giving first the plaintiff's mark

(Testimony of Allan L. Rowland.)

and the corresponding mark which appears in the second column.

Mr. Mellin: If your Honor please, for the sake of saving time I object to that. I think the document speaks for itself. He can make any comparison he wishes of the document.

Mr. Orr: I would like to have it in the record.

Mr. Mellin: I will stipulate the whole paper may be [223] written in the record. I don't see any point in having this witness read to the Court portions of the document and require us to read all of it.

Mr. Orr: It is, however, more important to read portions of this order; it brings it into the record in a logical order without the burden of sifting through.

The Court: We are not trying this case, are we?

Mr. Orr: We are not trying that case; we are identifying the marks that have been referred to in the judgment which has already been offered in evidence.

Mr. Mellin: They are already in the judgment.

Mr. Orr: These are the marks——

The Court: I will allow him to make a record of this.

Mr. Orr: The marks that have been given validity or recognized validity are listed in the judgment, but the marks which were charged to be infringed do not appear in the judgment, and this is for the purpose of identifying the marks that were charged to infringe that I wish the witness to read from paragraph XI of the plaintiff's complaint.

(Testimony of Allan L. Rowland.)

The Court: Go ahead.

A. "Storybook," "Hollywood Book," "Mother Goose"—and preceding that is the "Nursery Rhymes," "January Girl, "February Girl"—

Q. (By Mr. Orr): Perhaps it would be well to recite the Nancy Ann mark and then the Ippolito mark.

A. Nancy Ann mark: "March Girl," Ippolito mark, "March." [224]

Nancy Ann mark: "April Girl"; Ippolito mark, "April."

Nancy Ann mark: "May Girl;" Ippolito, "May."

Nancy Ann mark: "June Girl"; Ippolito mark, "June."

Nancy Ann mark: "July Girl"; Ippolito, "July."

Nancy Ann mark: "August Girl"; Ippolito mark, "August."

Nancy Ann mark: "September Girl"; Ippolito, "September."

Nancy Ann mark: "October Girl"; Ippolito mark, "October."

Nancy Ann mark: "November Girl"; Ippolito mark, "November."

Nancy Ann mark: "December Girl"; Ippolito, "December."

Nancy Ann mark: "Alice, Sweet Alice"; Ippolito mark, "Alice in Wonderland."

Nancy Ann mark: "Alice in the Looking Glass"; Ippolito mark, "Alice in Wonderland."

Nancy Ann mark: "Annie at the Garden Gate"; Ippolito mark, "Garden Gate."

(Testimony of Allan L. Rowland.)

Nancy Ann mark: "Betty"; Ippolito had three marks: "Betty Rose," "Sleeping Betty" and "Princess Betty."

Nancy Ann mark: "Betty Blue"; Ippolito mark, "Bluebell."

Nancy Ann mark: "Little Betty Blue"; Ippolito mark, "Little Bluebell."

Nancy Ann mark: "Little Joan"; Ippolito mark, "Jumping Joan."

Nancy Ann mark: "Little Miss Donnett"; Ippolito mark, "Little Miss Donnie."

Nancy Ann: "Little Miss Muffett"; Ippolito mark, "Muffett [225] With a Spider."

Nancy Ann mark: "Little Miss Donnett"; Ippolito mark, "Little Miss Donnie," which is repeated again.

Nancy Ann: "Lucy Locket"; Ippolito mark, "Lucy With Her Pocket."

Nancy Ann: "Margie Daw"; Ippolito, "Little Miss Teeter Totter."

Nancy Ann: "Mistress Mary"; Ippolito mark, "Mary, Mary, Quite Contrary."

Nancy Ann: "Polly, Put the Kettle On"; Ippolito mark, "Polly Prim."

Nancy Ann mark: "Pretty Maid"; Ippolito mark, "Pretty Kitty."

Nancy Ann mark: "Queen of Hearts"; Ippolito mark, "Queen Silver Bell."

Nancy Ann mark: "Red Riding Hood"; Ippolito mark, "Little Red."

(Testimony of Allan L. Rowland.)

Nancy Ann mark: "Ring Around the Rosy"; Ippolito mark, "Little Rosie."

Nancy Ann mark: "Roses are Red"; Ippolito had three marks that he used, "Rose Red," "Little Rosie" and "Little Red." That is all.

The Court: What is this recital? What is the purpose of the offer?

Mr. Orr: The purpose of the offer is to identify the [226] marks that are referred to in the judgment which has been offered in evidence here. The judgment indicated it was predicated in part upon the marks which are specified in the bill of complaint, and it is to indicate which marks were charged to infringe which other marks without the necessity of introducing this complaint.

Mr. Mellin: I think it is totally immaterial; we are not interested in "January Girl" or "Rosie Red" or things of that sort.

Mr. Orr: We are interested in determining the marks that were held to be valid and infringed by that decree.

Mr. Mellin: They were held to be valid and infringed because of the stipulation.

Mr. Orr: They are recognized to be valid.

Mr. Mellin: That is not binding in this case.

Mr. Orr: So held by the court and conceded by a big competitor in the field, the validity of certain of these marks. The other marks are set forth in the judgment, but the marks which were charged to infringe do not appear in the judgment.

The Court: You must always keep in mind that

(Testimony of Allan L. Rowland.)

this judgment is strictly between the parties and limited to that.

Mr. Orr: Apart from that fact, it still shows recognition by the trade of the validity of many of these trade-marks.

The Court: I don't follow you.

Mr. Orr: The defendant in the action stipulates and agrees [227] that the marks are valid and have been infringed.

The Court: That is his stipulation.

Mr. Orr: The judgment does not indicate what the infringing marks were, and it was charged in very harsh language that there had been an infringement of these marks, and I wish to convince your Honor that there has been no acquiescence. We have charged them with infringing a considerable number of marks. If your Honor will permit, we would like to show what those marks were here in a case where we dismissed our complaint and in other cases the defendant in the case has conceded the marks as valid and infringed, and agreed to discontinue their use.

The Court: I want to caution you in relation to this judgment. I want you to have in mind that while it is a judgment it is binding and it is binding only upon the parties to that contract.

Mr. Orr: That is all. While we recognize that, your Honor, it still is evidence of the recognition by a serious competitor of the validity of a great number of these marks, and I want the record to show whereas in this judgment it has been held that

(Testimony of Allan L. Rowland.)

the infringement has been withdrawn, I wish your Honor to know here that it wasn't a matter in a case where there was a serious question of infringement that we were willing to take off and withdraw our charge of infringement. The defendant, on the other hand, recognized that there was infringement [228] and he conceded the issue. There certainly were no spoils as implied by counsel.

The Court: It occurs so often and the courts can not control it. That is the reason why it doesn't impress me very much, any private agreement between the parties and the judge approving it has very little to do with the merits.

Mr. Orr: I am concerned in this particular case because of the implication that there was some irregularity in the settlement, some violation of the Fair Trade Act.

The Court: I will allow you a great deal of latitude to make statements that sometimes do not impress the Court.

Mr. Orr: With the lists and the opposition of the marks that have been read into the record, it will be perfectly clear what marks were recognized and conceded validity and which ones were withdrawn from the charge of infringement and why.

The Court: That did not impress me, I mean as far as the merits of this case are concerned, the statement by counsel. Sometimes in their anxiety to get results——

Mr. Orr: I am just guarding against the possi-

(Testimony of Allan L. Rowland.)

bility that your Honor might gain an improper impression from the comment.

The Court: No; I have seen it too often.

Q. (By Mr. Orr): I will direct your attention to an instrument appearing to be a Dun & Bradstreet report on Dollcraft Company, Inc., comprising three pages, the principal part being dated [229] January 18, 1949, and with the supplemental sheet dated July 8, 1949, and ask if you recognize what that instrument is.

A. Report—Dun & Bradstreet report on Dollcraft, Inc.

Q. Was that report furnished to you at your request? A. Yes.

Q. Will you please indicate from that report the indicated worth of the Dollcraft Company?

Mr. Mellin: May I object to that, your Honor, to introducing this testimony. We will stipulate that we are a small concern.

Mr. Orr: The purpose of this is to show the relative financial ratings of the company and the two individual defendants who are interested.

Mr. Mellin: That might be material. It is not material by a Dun & Bradstreet report; that is purely hearsay. There is nothing here to cross-examine.

Mr. Orr: We are putting it in as evidence of their worth; we are willing to put it in at its face value, whatever that may be.

Mr. Mellin: It is still incompetent, clearly incompetent and irrelevant and immaterial. These

(Testimony of Allan L. Rowland.)

reports have proved notoriously inaccurate. If you want worth, you can put the witnesses on the stand. They are in court. We will stipulate that we are rather small.

Mr. Orr: Will you stipulate that the firm of Hinz & Kerr [230] is valued at the approximate sum of \$120,000.

Mr. Mellin: Mr. Kerr and Mr. Hinz are both in court. You have the perfect privilege of putting them on and asking them.

Mr. Orr: We will call them in due course.

I wish in the meantime to have the document identified and the amounts indicated by the documents put into the record.

A. This shows a net worth——

Mr. Mellin: If your Honor please, I would like a ruling on that objection.

The Court: I will sustain the objection.

Q. (By Mr. Orr): Among the marks which you have registered, is there included the mark "Alice Through the Looking Glass"?

A. Yes, we have registered that one.

Q. Before registering that mark, did you make any investigation to determine whether or not it had been previously registered?

Mr. Mellin: If your Honor please, may I inquire from counsel through the Court the purpose of this? We are not charged in the cross-complaint on any trade-mark registration such as that. In fact, we are unaware of it, and it is entirely outside of the issues of this case.

(Testimony of Allan L. Rowland.)

Mr. Orr: The purpose is to show that among the dolls which they put out is a doll called "Alice in Wonderland." I wish to show that our client did not adopt "Alice in Wonderland" because it had been previously registered by another firm. [231]

Mr. Mellin: We are not charged with infringing the registration of somebody else other than the parties here. What difference does it make whether they registered it or did not register it?

Mr. Orr: It is evidence of the good faith of the Nancy Ann organization in selecting only those marks which are available and have not been registered by others. It further indicates the attitude of the cross-defendant in this action of appropriating as his property not only Nancy Ann, but the copyright property that was referred to yesterday and the registered marks of another organization.

The Court: What is this document you have in your hand? A. The price list.

Mr. Orr: That is the price list that I handed to him. I was merely asking him whether he had registered "Alice in the Looking Glass."

A. Yes, sir.

Q. Did you make a search in that connection?

A. Yes, sir, we made a search and found that it was not registered and not being used at the time.

Q. In connection with that search, was it ascertained whether any other marks of a somewhat comparable character had been registered?

A. Yes, "Alice in Wonderland" had been registered by one of the doll companies; that is why we

(Testimony of Allan L. Rowland.)

changed and did not register [232] "Alice in Wonderland."

Q. I will direct your attention to a document entitled "Trade-Mark Search Report," marked "Search Alice Through the Looking Glass," and ask you if you received that report. A. Yes, sir.

Q. What is the first item appearing at the head?

A. "Trade-Mark Search Report Based on U. S. Patent Office and Common Law Records," covering search of "Alice Through the Looking Glass."

Q. What is the first item that appears in the report, Mr. Rowland?

A. "Alice in Wonderland"—shows it was registered by Alexander Doll Company, first used in 1933.

Q. Does that give the registration number?

A. Registration number 304488.

Q. And the date? A. July 11, 1933.

Q. Referring to the second page of the document, the typewritten sheet at the bottom, will you read that?

A. "Alice Through the Looking Glass" is not found as an unregistrable mark for dolls and doll clothes.

Mr. Orr: I will offer the copy of the search report as defendant's exhibit next in order.

Mr. Mellin: If your Honor please, may the record show that that is some attorney's opinion, it is not an official document? [233]

The Court: The objection will be sustained.

Mr. Mellin: I object to it.

Q. (By Mr. Orr): Do you know of your own

(Testimony of Allan L. Rowland.)

knowledge that the Alexander Doll Company is using or has used the mark "Alice in Wonderland"?

A. Yes, sir, it has.

Q. Have you any independent knowledge that the mark is registered in the name of that company?

A. Through that document, yes, sir.

Q. But not otherwise? A. No, sir.

Q. I notice in connection with the price lists which were offered in evidence yesterday that there are two price lists for the year 1950. Will you explain why that occurred?

A. One was the opened eyes and we changed in March to movable eyes at an increased price, so therefore we had to put out a new price list.

Q. Has there been any other material change in your line in the last few months? A. No, sir.

Mr. Orr: No further questions.

One moment, Mr. Mellin. We have three dolls here which have been identified.

Mr. Mellin: We will stipulate they are the same as the other dolls. [234]

Mr. Orr: Will you stipulate they are identical with the correspondingly named dolls that are already in evidence?

Mr. Mellin: Yes.

Mr. Orr: As Plaintiff's Exhibits 30, 37 and 32?

Mr. Mellin: Surely; so stipulated.

Cross-Examination

By Mr. Mellin:

Q. Did I understand you to say yesterday when I

(Testimony of Allan L. Rowland.)

was cross-examining you, that as far as your knowledge was concerned, no one had put out dolls with the names of nursery rhymes and storybook characters except Nancy Ann, to your knowledge, or was I mistaken in that?

A. That we only put out those dolls?

Q. No; that is correct.

A. No, we put out other dolls.

Q. No, you misunderstood me. Didn't I understand you to testify yesterday afternoon in response to questions by me that, as far as you knew, no one had put out miniatures, small dolls, bearing nursery rhyme character names other than Nancy Ann dressed dolls? A. No, I didn't say that.

Q. You didn't say it?

A. I don't believe so.

Q. Well, let us have the facts then—other than this plaintiff, of course.

A. They can put out nursery rhyme dolls. We don't claim [235] exclusive use of nursery rhymes; all we are interested in are the nursery rhyme dolls we have copyrighted.

Q. That is all you are interested in?

A. There are thousands of other ones if you wish to put them out.

Q. Then it has been the practice for many years, for several decades, to put out dolls, small dolls with the names of nursery rhymes and storybook characters? A. No, sir, it has not.

Q. All right. How about the doll put out by the

(Testimony of Allan L. Rowland.)

Alexander Doll Company as early as 1933 bearing the name "Alice in Wonderland"? Isn't that a storybook doll character?

A. Mr. Mellin, for your information, it isn't a miniature doll that you are talking about. And Alexander Dolls have only a very short time made miniature dolls; they always made big dolls.

Q. What do you call a big doll?

A. Sixteen or seventeen or eighteen inches.

Q. Would it actually make any difference, the size of the doll?

A. Yes, it would make a difference. This ideology Nancy Ann has created back in 1937 has brought the small dolls into their own, has created an entirely new field.

Q. As a matter of fact, isn't it a fact that there are thousands and thousands and thousands of small dolls, dressed dolls, [236] sold besides the Nancy Ann dolls?

A. Presumably. I wouldn't say thousands; I would say quite a few.

Q. As a matter of fact, churches in their bazaars put out perhaps more dressed dolls than Nancy Ann makes completely, isn't that a fact?

A. No, it is not a fact.

Q. It is not a fact? A. No.

Q. You don't know that yourself?

A. We have sold them dolls. The amount we have sold them for church bazaars was very limited.

Q. They also obtain those undressed dolls from other sources?

(Testimony of Allan L. Rowland.)

A. That is correct. If they did so much business with dolls in one year, they wouldn't have to do it again, if there was so many dolls sold.

Q. Let us take dolls that have been sold for children's dolls. Isn't it a fact that over several decades dressed dolls have been sold bearing the names of fictional characters, in storybooks and nursery rhymes? A. That I can't answer.

Q. You know at least one, the Alexander line, has been sold for decades.

A. Not for that far back.

Q. Well, 1933? [237]

A. The records show that they had a doll in 1933 marked "Alice in Wonderland." I never saw the doll itself.

Q. And that is the only one that you know of that was put out that was ever named after a storybook or nursery rhyme character?

A. No, I told you a minute ago, the nursery rhymes, they can call them anything they want; we are not interested in that; there are thousands of nursery rhymes on the market to choose from; they don't have to choose from the ones that we took.

Q. As a matter of fact, you have adopted various nursery rhyme character names for dolls over the years and then abandoned the use of them, haven't you?

A. A few we have abandoned, yes, sir; very few.

Q. And that is true of the other lines of your dolls?

(Testimony of Allan L. Rowland.)

A. We have changed our dolls from time to time, yes.

Q. And each of the dolls that you put out under a particular name, you put a little label around the wrist with the name that they have, don't you?

A. That is correct.

Q. And that goes for all your dolls?

A. Yes, sir.

Q. For example, in your various series, for example, your American Girl Series that you had, you would put a little band around each arm, "Quaker Maid," "Colonial Dame," and so forth, and that would be true, for example, among this lot—— [238]

A. It is true of all our dolls; we put labels on all of them.

Q. So that in each instance those marks are in a sense, while maybe not registered, are your trade-marks, isn't that so?

A. Yes, sir, both registered and unregistered.

Q. They are all your trade-marks?

A. Yes, sir.

Q. Then it is a matter of fact you would probably have in the neighborhood of at least 105 or 106 trade-marks at the present time, wouldn't you, registered and unregistered?

A. Yes, sir.

Q. And each one would denote the origin of the goods in the Nancy Ann Dressed Doll Company, isn't that a fact?

A. Each one would denote the origin.

Q. The origin of the doll as being a product of Nancy Ann?

A. That is correct.

(Testimony of Allan L. Rowland.)

Q. So that when you see a doll with any label or legend that is among this list, that would mean it originated with Nancy Ann Dressed Dolls, Inc.?

A. Yes, sir.

Q. And that would be true of all of your 102 doll names that you are using at the present time?

A. Yes, sir.

Q. And it was the actual purpose, wasn't it, of each of those names, of each of these 102 names, to indicate that Nancy Ann was the producer of that doll? [239]

A. That's right; strictly on the advice of counsel.

Q. That is also true, isn't it, that as far as you are concerned, that when the appellation "Little Red Riding Hood" was put on the doll, that it did not describe any one character that the doll represented; it was merely to indicate that it was manufactured by Nancy Ann Dressed Dolls, Inc.?

A. And it was Nancy's interpretation of Little Red Riding Hood.

Q. Then it was put on for at least one purpose, of indicating the character in the story-books and nursery rhymes which the doll represented?

A. As her interpretation, yes, sir.

Q. Now I show you a 1941 price list of the Nancy Ann Dressed Dolls, Inc., and I call your attention to this. You recognize this?

A. Yes, sir.

Q. And that is an authentic list?

A. Yes, sir.

Q. I call your attention to what you term the Around-the-World-Series, and under that you have

(Testimony of Allan L. Rowland.)

French, Swiss, Dutch, Belgian, Spanish, Portuguese, Irish, Hungarian, Swedish, Mexican and Norwegian. Each one of those dolls had a little wristlet; for example, the Swiss doll had the name "Swiss" on it?

A. That is correct. [240]

Q. And that was your trade-mark?

A. Yes, sir.

Q. And that was descriptive of the doll or not?

A. No, it was not descriptive. It was Nancy Ann's interpretation of what that doll should look like.

Q. And it was purely for the purpose of indicating the origin of the goods, in Nancy Ann Dressed Dolls, Inc.?

A. That is right.

Q. Do you still have under what you call the Storybook Series in this 1941 list—I notice it says—this may not have been the Storybook Series description, "Little Betty Blue," "Little Sweet Miss," and so on, including "Alice in Wonderland." You told me you didn't adopt "Alice in Wonderland" a moment ago; did you tell us that?

A. Yes, sir, I made that statement.

Q. Would you see if it is in that list, please?

A. Yes, sir, it is on this list, No. 125.

Q. Can you tell us from that list of storybook characters and nursery rhyme characters which of those dolls listed there and named under the title "Description" that you do not at present manufacture and sell?

A. Well, I would have to have the 1950 price list, that one there, to tell; there is so many of them

(Testimony of Allan L. Rowland.)

changed it is hard to—"A Dillar-A-Dollar, a Ten o'Clock Scholar," we do not use. "Here I Am Little Joan"—no, excuse me. "Little Boy [241] Blue" we have—we discontinued for a number of years; it is discontinued now, "Little Boy Blue." "He Loves Me, He Loves Me Not." I don't believe we use "Lucy Locket" at the present time. We do not use "Alice in Wonderland" at the present time, or "Pussy Cat Pussy Cat"; "1, 2, 3, 4"; "Elsie Marley"; "Polly Put the Kettle On"; "Jack and Jill"; "Topsy and Eva"; "Hansel and Gretel"; "Gerda and Kay," and the "Babes in the Woods," that is all.

Mr. Mellin: Thank you, Mr. Rowland. Now I will offer the 1941 price list that I have just been discussing in evidence as plaintiff's next in order.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 58 in evidence.

(Whereupon the price list referred to was marked Plaintiff's Exhibit No. 58 in evidence.)

Q. (By Mr. Mellin): By the way, Nancy Ann Dolls at the present time are plastic dolls, the bodies? A. Yes, sir.

Q. Not bisque? A. No, sir.

Q. I hand you Exhibit 58, which is the 1941 price list, and I hand you Defendant's Exhibit H-8, which is the 1945 price list. I hand you Exhibit H-10 which is the 1947 price list; H-11, the 1948 price list; H-12, the 1949 price list; H-13, 1950 price list—there are two of these? [242]

A. Yes, sir.

(Testimony of Allan L. Rowland.)

Q. H-14, 1950 price list; H-6, 1943 price list; H-7, 1944 price list; H-5, 1942 price list; H-3, 1940 price list; H-2, 1939 price list, and H-9, 1946 price list, and I will ask if in any place in there does there appear the word or trade-mark "Story" in connection with any of your dolls?

A. No, I can tell without looking at them.

Q. As a matter of fact, you have never used the word "Story" in a trade-mark sense, have you?

A. Not in the publication of our price list.

The Court: The word what?

Mr. Mellin: Story—S-t-o-r-y.

Q. That was purely registered to put another picket in this fence around this type of doll business, isn't that a fact?

A. No, it was registered with the name "Story"; we intended to use it.

Q. You intended to use it?

A. Yes, we have. We used it in a sense where the dolls——

Q. In a technical way to comply with the statute? A. Probably a legal way.

Q. Would you say when you see the word "Story" in connection with dolls that is a doll product of Nancy Ann Dressed Dolls, Inc.?

A. Oh, to a child's mind, I would say yes, very much so.

Q. As a matter of fact under your theory of Nancy Ann's developing of these fairyland creatures and dolls, almost any [243] child hearing of any one of the fairyland dolls or any fairyland or

(Testimony of Allan L. Rowland.)

story-book character would be likely to think it is a Nancy Ann Doll; is that so?

A. That is correct.

Q. And so that actually from your theory of it any doll, any small doll, small doll that was named for any of the well known story-book characters would to you indicate that it was—should indicate that it is the product of Nancy Ann Dolls, Inc.?

A. No, not necessarily. After all, when ten million dolls have been produced and sold all over the United States, the youngsters who are our customers naturally come to recognize a story-book character as a Nancy Ann Doll. It isn't saying it is our doll by any means.

Q. Is that true of the foreign dolls which you have put out among those ten million?

A. Not necessarily.

Q. But it would not be under the foreign dolls and the other dolls like the "Bride" and those, but as far as the story-book characters are concerned, it would be true?

A. That "Bride," yes, and the "Bridesmaids," and story-book characters.

Q. How many years, have you determined, before Nancy Ann made a doll dressed to characterize a bride, had a doll been so dressed to your knowledge?

A. Well, probably long before I was born. [244]

Q. So that if you apply the appellation of "Bride" to them, it would be purely of a doll dressed to represent a bride, wouldn't it?

(Testimony of Allan L. Rowland.)

A. Well, Nancy Ann's interpretation; but we never attempted to register that doll. That is one of the dolls we don't intend to register.

Q. One of the marks that you complain of which we use is the term "June Bride" as applied to a doll dressed as a bride; by the way, is there someone back there helping you answer?

A. No, I wish there was.

Q. I just wanted to make certain of that. "June Bride." Would you say that that term is not descriptive of a doll dressed as a bride?

A. It may be. As far as we are concerned, it is not descriptive of Nancy Ann's interpretation of what——

Q. I am talking of the Dollcraft doll.

A. If they want to make——

Q. That isn't Nancy Ann's interpretation, is it?

A. No, it is not.

Q. I don't mean to argue with you; I beg your pardon. One of the dolls by the Dollcraft people is dressed as a bride, you know that?

A. Yes, sir.

Q. And it carries the name "June Bride"?

A. Yes. [245]

Q. And you have complained that it is an infringement of one of your dolls?

A. We have only complained about the "June."

Q. Just the "June" part of it? A. Yes.

Q. Wouldn't you say that the appellation "June Bride" as it applied to a doll dressed to simulate a

(Testimony of Allan L. Rowland.)

bride—would you say that is descriptive of the doll?

A. It is descriptive of their doll, yes.

Q. It would be descriptive of our doll?

A. Yes.

Q. Purely descriptive, is that a fact?

A. Yes.

The Court: We will take a recess.

(Recess.)

Q. (By Mr. Mellin): The “June Bride” doll that we have just been discussing is Plaintiff’s Exhibit 38, isn’t that a fact? A. Yes.

Q. I asked you the question whether or not the word “story” when used in connection with dolls indicated that the producer of the dolls was Nancy Ann Dressed Dolls, Inc., and as I recall it, you said it did? A. Yes, sir.

Q. And to the same extent the words “Fairy Tales,” “Fairyland,” and “Storybook” would apply? [246] A. Yes, sir.

Q. Now, I notice on one of the brochures of Nancy Ann, which I hand you, and I ask you to disregard my own pencil marks on there to indicate the notation of 102, that three times across the top appears the name “Storybook Dolls,” and underneath that is a notation “Trade-Mark Registered.”

A. Yes.

Q. Your trade-mark registration pertains only to “Storybook”? A. Yes, sir.

Q. Would you say that when the words are used together, “Storybook Dolls,” that that would indicate dolls representing characters in story books

(Testimony of Allan L. Rowland.)

or not? A. Yes, they would, story-book dolls.

Mr. Mellin: I offer the little brochure that I have shown the witness and ask that it be admitted in evidence, no regard to be paid to the pencil marks on it, they are my own.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 59 in evidence.

(Whereupon the brochure referred to was marked Plaintiff's Exhibit No. 59 in evidence.)

Q. (By Mr. Mellin): Now, when did Mr. Patterson begin to handle your line as a manufacturer's agent, Mr. Rowland? A. In 1937.

Q. And he traveled rather extensively and made contacts for the company in the various department stores? [247]

A. He traveled from Kansas City—no, when he first went to work with us he was employed in the Deep South working for Keystone Brothers in San Francisco and working our dolls as a sideline.

Q. And that territory was extended, was it?

A. No, he was transferred by Keystone Brothers to another territory which took him from Kansas City to New York.

Q. Then at that time he was traveling substantially all east of the Mississippi?

A. Yes, sir; that is, above the Mason and Dixon line.

Q. He wasn't an employee, was he?

A. No, sir, he was not.

Q. He was a manufacturer's agent?

(Testimony of Allan L. Rowland.)

A. Yes, sir.

Q. And he had been a rather successful one on leather goods and what have you?

A. Yes, sir, from what I understand.

Q. And at the time that he handled your dolls he also handled these other lines?

A. Yes, sir, Keyston Brothers.

Q. That is in San Francisco? A. Yes, sir.

Q. How long did he stay with you?

A. Until 1945.

Q. That was in the beginning of 1945? [248]

A. Yes, sir.

Q. As a matter of fact, you cut his fee from ten per cent to 1 per cent in 1944, didn't you?

A. Yes and no.

Q. You cut it first from ten to seven and one-half?

A. No, sir; we asked him, with our other representatives—we were having financial difficulty, and we asked Mr. Patterson along with the other representatives to not call on the accounts or have anything to do with them and we would coast along with them and pay them 1 per cent commission until things got straightened out.

Q. That was during the war? A. Yes, sir.

Q. When you didn't need any representatives to sell goods at that time?

A. That was one of the reasons, yes, sir.

(Testimony of Allan L. Rowland.)

Q. And Mr. Patterson then said he couldn't afford to handle the line any more?

A. No, he wasn't handling the line; all he had to do was just collect 1 per cent each month and do nothing.

Q. I mean, he didn't accept the one per cent?

A. That's right.

Q. He told you he would prefer not to handle it?

A. Yes, sir.

Q. But you didn't part bad friends? [249]

A. No, sir, but he did. I will inject something more in there.

Q. Go ahead.

A. We told Mr. Patterson we didn't need him any more because he was handling another line of dolls, which happened to be the Kerr and Hinz dressed dolls.

Q. That was after you cut his percentage to 1 per cent?

A. No, just at the same time. It may be after or before, but it all came about because of that.

Q. Undressed dolls was not a competitive line?

A. We have undressed dolls in our line.

Q. Do you? A. Yes, sir.

Q. Who do you sell them to?

A. All the department stores.

Q. Was he handling undressed dolls for you, too?

A. We had undressed dolls at the time if anybody wanted to buy them.

Q. As a matter of fact, Mr. Rowland, you were

(Testimony of Allan L. Rowland.)

rather choosy about whom you sold dolls to, is that correct? A. That is correct.

Q. As a matter of fact, if an account was small and not impressive, they couldn't be a customer?

A. No, that is in error; if their financial standing was such it would cause hardship, we would prefer selling——[250]

Q. For example, you always refused to sell to large chain stores, did you? A. That is correct.

Q. For example, you commenced selling your dolls in flower shops, didn't you?

A. No, we didn't commence,——

Q. You did in the early days sell to flower shops? A. Yes, we sold a few.

Q. Then your representatives were instructed they couldn't sell to flower shops?

A. No, sir, that is a misstatement. I believe there was only one man in the United States that sold florist shops. We found out they were interfering with the department stores and we stopped shipping dolls to them.

Q. What about the candy stores?

A. The few candy stores we had, one of them, which was Mr. Patterson's customer, under the name of Annie's, we didn't know for a long time, then we discontinued that because it was misrepresented in the first place.

Q. As a matter of fact, the practice is that now you sell almost exclusively to department stores, and to name gift shops?

(Testimony of Allan L. Rowland.)

A. The better gift shops, yes,—better, I mean, financially.

Q. One of your complaints here is that selling to smaller shops and what have you by the Dollcraft Company in some fashion brings you out of the higher brackets, or, let us say, lowers [251] your dignity?

A. No; I think that is a misstatement on your part. I don't think dolls of the type sold to children should be sold in liquor stores. I don't think it is fitting with the dolls.

Q. You only know of one instance of that kind?

A. That's right. I didn't go around town looking; it was called to my attention.

Q. Did you consider it unfair of Mr. Patterson to also handle and continue to handle a line of undressed dolls?

A. Any time a representative who is working for you handles another line, whether it is competitive or not, and doesn't tell you about it, it is unfair. No firm would stand for it.

Q. Let us assume after he severed his connection with you that he then commenced to handle undresser dolls; would you consider that act as an unfair one in any fashion?

A. No, I guess a man has to make a living, but he was calling on our same customers.

Q. Those customers—you make no charge that anyone used your customer list?

A. No, naturally.

(Testimony of Allan L. Rowland.)

Q. In fact, the prospective retailers for dolls is not a matter of confidential information?

A. No, sir; it is universal.

Q. Now, with respect to Mr. Kerr, when did he leave your employ? [252]

A. In the middle of '44.

Q. And what did he do after that, to your knowledge?

A. Well, I don't know what he did for a while.

Q. You know, as a matter of fact, he also went into the business of undressed dolls, don't you?

A. Yes, after leaving our place disgruntled, he entered the business of undressed dolls.

Q. What was he disgruntled about? Because he wanted a raise and you didn't see fit to give it to him?

A. No, he wanted to be superintendent or else, so we gave him the "or else."

Q. Not getting a promotion, he went away disgruntled?

A. He was getting all he was worth. That is generally the way you base people's pay, with our people.

Q. He was general shipping clerk when he left?

A. That was his classification.

Q. Then he went into the undressed doll business, did he?

A. Yes, sir.

Q. Do you make any charge that it was unfair of that Kerr that went into the business of dressed dolls?

(Testimony of Allan L. Rowland.)

A. No, when he leaves us he is entitled to do anything he wishes.

Q. (By The Court): What was his salary when he left?

A. Without looking it up, sir, I couldn't tell you.

Q. Approximately? [253]

A. I would say in excess of \$60 a week. That was in 1944.

Q. (By Mr. Mellin): To your knowledge, he wasn't connected in any fashion with any dressed dolls for some years after that?

A. That is right.

Q. In other words, as far as you know, not from 1944 up to 1948?

A. That is right.

Q. Or the middle of '48?

A. Yes.

Q. And you don't make any charge here, do you, that he improperly used any of your customer lists?

A. Well, we don't make any charge, but the fact still remains that a number of our resources reported back to us that the company was trying to buy material from them, so we just—they automatically said they were selling to Storybook Dolls, and they wouldn't sell to them—even to the extent of going to the Nason Paint Company in San Francisco and trying to secure the color of paint we use, which is a little bit different than anybody else. Nason refused to sell them.

Q. Who was it that made the inquiry, do you know?

A. What inquiry?

Q. At Nason.

A. No, I don't. The salesman at Nason told me

(Testimony of Allan L. Rowland.)

that they were trying to buy paint from them; they said no, they were selling Nancy Ann, they couldn't do it; they would give them any other [254] color they wanted.

Q. There are many thousands of suppliers for materials for dressed dolls, isn't that so?

A. That's right.

Q. And they actively pursue their business in trying to sell the goods?

A. Yes, but not to competitors.

Q. In other words, one make of goods will sell only one account?

A. No, they won't sell one account, but a manufacturer of materials tries not to have any conflict with his materials. In other words, he will sell a dress account and doll house, or somebody making lingerie or something like that, so he won't have any direct conflicting; in other words, large diversification of customers is a lot better for the sales.

Q. That is true in men's clothing and women's clothing?

A. That is correct.

Q. In other words, that has always been the policy?

A. Yes.

Q. You don't recall or you don't know of any instance where the materials that Dollcraft used was the same material as used in your dolls?

A. No, but they are similar, confusing.

Q. And would you say that was true in reference to the Who Am I series? [255]

A. Yes, with the braids on them, on the material we use. It isn't a case of the braids; the materials—

(Testimony of Allan L. Rowland.)

it is a fact that there is a confusing—over all confusing similarity in the two dolls.

Q. Because they are both small?

A. They are both small; their origin was the same. The face is changed very little, and customers who were buying Storybook dolls, buying bisque dolls which were made formerly for Nancy Ann, were acquainted—they were acquainted with the features of the dolls, the characteristics of the dolls, and when this outfit started to make—Dollcraft started to make them, there was an over-all similarity that Mr. Patterson was able to sell the customers. It is just one of those things that is poor business ethics.

Q. In other words, that is what it was; it wasn't unfair?

A. We considered it unfair.

Q. As a matter of fact, I thought you testified yesterday that these dolls made by Mr. Hinz were unsatisfactory?

A. They were very much so.

Q. And isn't it a fact you said "Our molds"—isn't it a fact that those were Mr. Hinz's molds?

A. Mr. Hinz made the molds from our original mold; he didn't make the mold himself, by any means; he copied it from somebody else, and all his molds were made from a master mold given to him by somebody else. [256]

Q. But the investment and the making of these dolls for Hinz was the Hinz investment?

A. The investment was very small, compared to the sales.

Q. Whatever it was, it was all his?

(Testimony of Allan L. Rowland.)

A. Yes, sir; yes, sir.

Q. And you terminated that relationship rather abruptly, didn't you?

A. No, the termination of that association was leading up over a period of time. First of all, he couldn't get the deliveries the way we wanted them; we couldn't get the dolls the way we wanted them, and certainly we wouldn't go out and buy a plant in Stockton at the cost of thousands—twenty thousand—twenty-seven thousand dollars to make dolls if we didn't have to do it. We were forced to do it.

Q. As a matter of fact, you told Mr. Hinz that if he wouldn't make dolls exclusively for you, you would cancel the contract, didn't you?

A. No, sir, we did not; we never have; we are still doing business with somebody else.

Mr. Mellin: I beg the Court's pardon; I lost the letter.

Would you read the last question and answer?

(The reporter read the last question and answer.)

Q. Now, you are certain that is a fact?

A. Now that you mentioned the letter, I am not certain that it is a fact. [257]

Q. As a matter of fact, you wrote him a letter and told him that if he wouldn't manufacture dolls for you exclusively, you would cancel all present and future orders at that time?

A. I don't recall.

(Testimony of Allan L. Rowland.)

Q. You don't know now?

A. I don't recall, no, sir.

Q. I show you a letter dated July 7, 1945, on the letterhead of Nancy Ann Dressed Dolls, to "Myers Ceramics Products Company, Post Office Box 97, Santa Clara 29, California.

"Attention: Mr. Hinz.

"Dear Les:

"Unless we have a contract for your exclusive output on dolls, it will be necessary to cancel all present and future orders.

"We sincerely hope this will not be necessary.

"Very truly yours,

"A. L. ROWLAND."

Is that correct?

A. Yes, sir, that is correct.

Q. That refreshes your recollection, Mr. Rowland, doesn't it? A. Yes, sir, it does, yes.

Mr. Mellin: I will offer that letter in evidence as plaintiff's next in order.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's 60 in evidence.

(Whereupon the letter referred to was marked Plaintiff's [258] Exhibit 60 in evidence.)

Q. (By Mr. Mellin): Now, as far as you know, then, up until the time that Mr. Hinz—by the way, the making of doll bodies, is a very small part of

(Testimony of Allan L. Rowland.)

Mr. Hinz, ceramic operations to your knowledge, isn't that correct? A. Very small.

Q. Up until the time that Mr. Hinz became associated with the Dollcraft Company in the middle of 1948 Mr. Hinz was in the undressed doll business and not in the dressed doll business, isn't that correct? A. To the best of my knowledge, yes.

Q. You cancelled your relations with Mr. Hinz in 1945, didn't you?

A. That is right, for a very definite reason, now that the letter has been revived.

Q. Now, you have the reason for the letter?

A. No, not a reason for the letter, but the statement of the reason for the letter.

Q. As a matter of fact, the reason for the letter was that Mr. Hinz had discovered that you folks were making an investment of thirty-five thousand dollars in cash to buy a ceramic plant to make your own doll bodies?

A. He knew we were buying that plant. We were forced to buy it; we were forced to spend \$27,000 because Mr. Hinz couldn't supply us with the product we wanted. [259]

Q. Is it your contention that the bisque dolls that are made here today by the plaintiff are the same as those dolls that you are making?

A. No; they are similar. They have been changed.

Q. All small doll bodies would be somewhat similar?

A. We are talking about the features.

(Testimony of Allan L. Rowland.)

Q. As a matter of fact, I can't tell the difference between the features of your plastic doll and any other doll; that must go to the expert.

A. The customer must be able to do it because the sales speak for themselves.

Q. There isn't anything secret or confidential as to who sells braids, trimmings and cloth goods that are used?

A. No, not at all.

Q. As far as your knowledge is concerned, Dollcraft or Mr. Hinz or anyone else did not purchase materials from any one of your sources, did they?

A. Not to my knowledge, no.

Q. And you testified that Mr. Kerr had more or less the run of the plant while he was employed?

A. Yes, sir.

Q. And there wasn't anything particularly confidential in the plant, was there?

A. Nothing particular; just the know-how of a few certain shortcuts and things of that type. [260]

Q. As a matter of fact, you used to take visitors through; and they would see as much of a secret character—could see—

A. No, visitors in the course of fifteen or twenty minutes in the plant do not observe what anybody who is in the plant would observe.

Q. Do you know of any facts which would lead you to believe that Mr. Kerr has used any of the knowledge at all which he gained at your plant?

A. No, sir.

Q. As a matter of fact, you heard Mr. Kerr testify that he had nothing to do with the material,

(Testimony of Allan L. Rowland.)

braids and trimmings used in dressing dolls at the Dollcraft, haven't you? A. That is correct.

Q. You know of no facts to the contrary, do you? A. No, sir, I do not.

Q. You also know, as a matter of fact, that Mr. Patterson is no longer selling dolls, is that correct?

A. No, I don't.

Q. Isn't it a fact that you tried to get Mr. Patterson in some sales capacity for dolls, as late as last year? A. Yes, sir.

Q. Now, with respect to Mr. Hinz, you heard counsel say that there was a concerted plan of action between Mr. Hinz, Mr. Kerr and Mr. Patterson to—here is what counsel said:

“There developed a plan of action involving Mr. [261] Patterson, Mr. Kerr and Mr. Hinz to avenge their wrongs at the hands of Nancy Ann at the expense of Nancy Ann.”

Would you tell us any facts that you might know which would support that statement?

A. Before Mr. Kerr left our organization—

Q. Go ahead.

A. Before Mr. Kerr left our organization he and Mr. Hinz were very chummy, and Mr. Kerr never left the organization because he was disgruntled at us; when he left there he had a proposition some place else.

Q. And what about anything that Mr. Hinz has done? A. Nothing.

Q. What about Mr. Patterson?

(Testimony of Allan L. Rowland.)

A. Just the three of them are disgruntled, that is all, and I think the record speaks for itself, inasmuch as supposedly the amount of money they were going to spend and commissions. Mr. Patterson was most open after him trying to make money out of anybody in the organization.

Q. He did a very marvelous job, didn't he?

A. Yes and no.

Q. Marvellous enough for you to offer him \$75,000 dollars a year last year?

A. We never offered him \$75,000.

Q. Or what would be equivalent to that?

A. No, sir, not the equivalent to it; not when anybody lends [262] his money back at ten per cent.

Q. What was confidential that you had told or disclosed to Mr. Hinz about the doll business?

A. Nothing at all. He isn't in the doll business. He knows how to make ceramics.

Q. In other words, he is a very practical workman, he personally, in that business?

A. I don't know anything about him; I guess so.

Q. Is this statement I just read of your counsel at this time based solely upon the fact that Kerr was your former shipping clerk; that Hinz was formerly supplying unfinished bodies and that Mr. Patterson formerly represented you as a manufacturer's agent?

A. It would appear that way on the face of it.

Q. That is about all your charges against these three men amount to?

A. That's right, and remarks made to the buyers

(Testimony of Allan L. Rowland.)

that I can't remember, that were carried back to us. Mr. Patterson spent most of his trips through the East talking about Nancy Ann, how he was mistreated, and so forth.

Q. There is an awful lot of gossip between buyers, isn't that a fact?

A. That's right, but the buyers passed it back to the manufacturers, because they didn't like it.

Q. You spoke of the sales of dolls by the defendant, and I [263] think that you said some—did you say ten million dollars worth or ten million dolls?

A. Ten million dolls.

Q. A considerably large portion of those were not dolls pertaining to fairyland and story-book characters, isn't that so?

A. The majority of them were.

Q. The majority of them were?

A. Yes, sir.

Q. What about the dolls here in issue? I mean that we are discussing—"Little Bo-Peep," "Little Miss Muffett," "Little Goldilocks," and what have you? What proportion of that total would they add up to?

A. They are very, very popular numbers in the line today. I think they will probably run about ten to one of the rest of the numbers in the series, those particular numbers you speak of.

Q. As to your total doll sales, they would run about 10 per cent?

A. No, they would run about 60 or 70 per cent—that is, in that particular series.

(Testimony of Allan L. Rowland.)

Q. You produced in 1947 what you called a package doll, in which you preprinted the bills?

A. Yes, sir.

Q. Now, I went through your list and I picked the numbers off [264] of here——

A. Yes.

Q. And out of 2660 some-odd dolls per order, approximately ten per cent were dolls that were involved in this issue leaving out the word "Story-book"; and I am talking about the particular names, named dolls descriptive names, "Bo-Peep" and what have you.

A. Yes.

Q. About ten per cent of them were those dolls that we have before us. Would that agree with your count?

A. No, Mr. Mellin, you only have part of the records there. In other words, they had a unit shipment; maybe that same store ordered a tremendous order. We could work out thirty-six units, very fast, quick, through our shipping department. We shipped them. As you saw the order for the May Company, it was \$50,000. Those ordered individually are only \$22,000.

Q. By the way, you said the largest doll order.

A. I said one of the largest orders in my opinion of miniature dolls.

Q. You mean Nancy Ann Dolls?

A. Miniature dolls, miniature dolls.

Q. You have no personal knowledge of the sales of the Alexander Doll Company?

A. Not individual orders, just plain dolls—miniature dolls.

(Testimony of Allan L. Rowland.)

Q. In other words, it is just your guess, your surmise? [265]

A. No, the May Company is probably one of the biggest purchasers in the country today. I have never heard of an order of that size before in the history of the business.

Q. I will hand you Exhibit E, and I ask you to check over that exhibit, and see if my figures are not correct, a little over ten per cent—I think out of 2600 dolls per order, there was somewhere in the neighborhood of 280 dolls, were of the dolls we are discussing here.

A. As I say, this particular order it may be that; but we are not shipping orders this way any more; we are not shipping units, we are shipping dolls by individual dolls.

Q. You didn't bring any invoices or other documents to substantiate that 60 per cent?

A. I got these out of the file, and whether or not there are other orders there I can not say.

Q. Every one of those orders was on file?

A. That's right, the 36 units.

Q. They were preprinted?

A. That is right.

Q. So that if someone wanted dolls they took them or else?

A. No, you are wrong. It was during the war they took them or else.

Q. This was during the year——

A. This was 1947; this wasn't during the war.

Q. As far as those orders were concerned, you

(Testimony of Allan L. Rowland.)

would say my [266] calculation of around 10 per cent would be approximately correct?

A. No, I wouldn't say it unless I sat down and checked it off.

Mr. Orr: I object to any such question. After all, all these dolls bear the word "Storybook" or "Story" so it could be roughly said that every one of them was included. If you want to narrow it down to any particular one of the minor marks, that can be done, as to a specific mark you want to investigate.

Mr. Mellin: I hand you Exhibit E——

Mr. Orr: It is a needless waste of time. The figures are in the record, and the percentage can be certainly established so far as the present question is concerned.

The Court: You might take that during the noon recess and go over it.

Mr. Mellin: O. K., your Honor.

Q. (By Mr. Mellin): Calling your attention to Exhibit 59, there is in controversy here, in addition, others, that the ones I am interested in are the ones I will give: "Mistress Mary"; No. 25.

A. The numbers have been changed since that time.

Q. What catalogue will we get these out of?

A. The 1947 catalogue.

Mr. Orr: I wish to offer a further objection that any tabulation made from a limited number of records of this kind [267] would be useless. There are so many thousands of other records and fluctuations

(Testimony of Allan L. Rowland.)

every week, so whatever figure he would arrive at would be meaningless.

Mr. Mellin: Then what was the purpose in introducing this?

Mr. Orr: To show that there was a tremendous sale of these dolls throughout the country.

Mr. Mellin: Well, the purpose of the cross-examination is to show that the tremendous purchases are due to a lot of other things than the particular dolls in question. I think it is proper cross-examination.

Mr. Orr: It seems to me it is a very needless waste of time and it doesn't conclude the fact.

The Court: You offered this. Now he has challenged it. He says it is only ten per cent.

Mr. Orr: He hasn't specified it as ten per cent.

The Court: You offered it. He has a right to examine on it.

Mr. Orr: At least as to one mark, it speaks for itself, that it involves only one of them.

The Court: He can't speak. You don't know whether it is ten per cent or forty.

Mr. Mellin: "Mistress Mary," No. 25; "Goldilocks," No. 28; "Little Red Riding Hood," 116; "Little Miss Muffett," 118; "Little Bo-Peep," 153; "Curly Locks," 154; "Sugar and Spice," [268] 158; "Little Miss Donnett," 163. And for your information the price list and the number are exactly alike as to the two lists, Mr. Rowland.

A. Well, it just happens to be. There was a lot of changes in the thing.

(Testimony of Allan L. Rowland.)

Q. I am confining it just to them. I would like to have you calculate in the noon hour the number of those dolls, of which there are——

A. Eight, I believe.

Q. Yes, and one more, "June Girl," No. 192. Just a moment. That is the wrong one here, 1947.

A. 192 is right.

Q. Is it 192? It says "Rosebud Girl."

A. "Rosebud Girl" is the same as "June."

Q. Is that the one you charged to be infringed by this bride one of those? A. Yes.

Mr. Orr: How about the mark "Fairyland"?

Mr. Mellin: I am not interested in those; I excluded "Fairyland," "Fairy Tales" and "Story-book."

Mr. Mellin: As a matter of fact, there is no indication on those, because those dolls are listed by number, aren't they?

A. Yes.

Q. And there is no indication number of any trade-mark, "Fairyland" or "Storybook" on them, is there? [269] A. No, sir.

Q. They are confined just to doll numbers with particular doll names; isn't that so? A. Yes.

Mr. Mellin: I ask that my request be confined to that.

Q. It wouldn't be a large task, would it? You only have to calculate on the first one and then multiply by the 29 invoices? A. Yes.

Q. With respect to the doll packages that the defendant and the plaintiff utilized for their dolls,

(Testimony of Allan L. Rowland.)

you don't contend that those packages were actually—are actually copied from anything that the defendant Nancy Ann Doll Company put out; the packages are distinctive, aren't they?

A. No, I disagree with you on that.

Q. In your opinion, they are not distinctive?

A. They are.

Q. They are distinctive? A. Yes.

Q. One is distinctive from the other?

A. No, they are very similar. The over-all picture is similarly confusing, for the simple reason that we have packaged dolls a certain way. We have put spreaders in the doll a certain way to hold the doll. We have put booklets in the boxes for the little girl. Everything is—the over-all picture is confusing to the child regardless of the color, [270] shape or matter; the idea is it was a small box, it is a small doll.

Q. Small box. You are not the first to put dolls in boxes, are you? A. No, I am not.

Q. For example, let's take part of them. You don't package your dolls in bottles?

A. No, I should say not.

Q. And you have no complaint about them putting the "By Dollcraft, Santa Clara, California," on them, have you?

A. No. The over-all similarity of the whole thing; that is the only thing we have any question about.

Q. And you don't complain of them using the cellophane lidded boxes, do you?

(Testimony of Allan L. Rowland.)

A. That is a similarity of the box and the doll and the booklets in the box.

Mr. Mellin: Now, may I have his deposition.

Q. I call your attention to your deposition of page 70, commencing on line 12:

“Q. Now, before recess we were discussing the similarity between the dolls put out by the plaintiff and the dolls put out by the defendant under the various names of fictional characters as designated in the pleadings, and inquired into the similarity and appearance of them, and I should like to ask you at this time, you do not contend [271] that there is any similarity in the appearance of the packages?”

“A. No, sir, I do not.”

Wasn't that question asked and that answer given?

A. That is correct; there is no similarity in the likeness of the boxes, but it is the over-all ideology that has been copied.

The Court: Over-all ideology. Will you spell that out, just what do you mean?

A. Well, the theory of Nancy Ann is to put out small Storybook dolls depicting characters of the nursery rhymes, certain nursery rhymes and certain Mother Goose series. We have packaged them a certain way. We have educated the child over a period of 13 years. We are putting out a miniature doll with a booklet in the box. Every one of these

(Testimony of Allan L. Rowland.)

outfits that come out and attempt to make some copy of the Nancy Ann dolls, the real reason for it is to try to package them with some similarity, not particularly as to color, but as to the general idea; and then the first thing that happens, they get the same kind of a booklet in the box. I appreciate that there is no law to stop them from putting booklets in, but it is the over-all ideology of Nancy's creation of Storybook characters. If we hadn't sold ten million dolls 90 per cent of these doll companies would probably never have started, because they wouldn't start——

The Court: There is a hundred million worth of materials [272] on the market, isn't there? This doll business has got to be a large business.

The Witness: It is about a three hundred and fifty million dollar business. Always has been—I think the doll business always has been large.

The Court: Somebody told me at the Emporium, one of the stores, that they have a window full.

The Witness: We have a special department in the Emporium.

The Court: I think they have them in the window.

Mr. Mellin: Yes.

The Court: I may say in passing, subject to change, that you gentlemen may get some idea of my personal state of mind, it looks like a free-for-all market.

Q. (By Mr. Mellin): Mr. Rowland, this idea, this general idea—very frankly, I am not clear on

(Testimony of Allan L. Rowland.)

what you mean by ideology, and I am not going into it; but isn't it a fact that at least as early, well, some time in the 1800's, they put out paper dolls, small paper dolls?

A. Mr. Mellin, that was before my time.

Q. I understand that, but you know from being in the doll business for fifteen years.

A. I told you before I had no interest in paper dolls; I know nothing about them, when they were put out or anything about them.

Q. I want to ask you if you are familiar with the fact that [273] there is a good deal of literature put out on dolls?

A. A great deal of literature; in what form do you mean?

Q. Well, doll collecting, doll making—there is a great deal on it, is that the fact?

A. People will write articles on anything.

Q. But you said that when it came to people that had anything to do with dolls yesterday you gave the Court the inference that the public generally, and those particularly in the doll business, that when they saw a "Goldilocks" or a "Little Red Riding Hood," that that meant Nancy Ann Dressed Dolls? Didn't you give that impression?

A. Yes, sir. Yes, I did.

Q. Let me read you this——

A. What are you reading from, please?

Q. I will tell you in a moment. "Cavalcade of Toys," by Ruth and Larry Freeman, that was copyrighted—a number of them, and this one was copy-

(Testimony of Allan L. Rowland.)

righted in 1942, this one here, and others antedating it. It is offered to show what the contemporaneous literature thinks of Nancy Ann dolls as being exclusive:

“Long ago, just as now, dolls were named for noted celebrities. Besides ‘Jenny Lind, the Swedish Nightingale,’ there were ‘General and Mrs. Tom Thumb,’ ‘Commodore Nutt’ and ‘Minnie and Warren’ (P. T. Barnum’s famous circus midgets); ‘Little Red Riding [274] Hood,’ ‘Little Miss Muffett’ and others from Mother Goose Rhymes, as well as ‘Madame Pompadour’ and many French court favorites; dolls of American patriotic design were also common.”

You knew of that, didn’t you?

A. Yes, but they were never registered marks.

Q. They didn’t bother to register them; that is the difference? A. That is right.

Mr. Mellin: I am going to offer the page in that book.

Mr. Orr: I am going to object to it.

Mr. Mellin: Let me offer it first. “Cavalcade of Toys” by Ruth and Larry Freeman, it came from the library of the University of California. It was copyrighted in 1942 by Ruth and Larry Freeman, all rights reserved. I am not offering it, your Honor, to prove prior adoption of any trade-marks of those dolls, but merely to show that in contemporaneous literature Nancy Ann is not given any

(Testimony of Allan L. Rowland.)

credit for exclusive ideology or small dolls named for nursery rhyme characters, and I am certain that it is admissible on that point, your Honor.

Mr. Orr: I object to it on the ground the publication itself is no evidence of what the fact is; it is merely the impression of that particular author and has no probative value in this proceeding whatsoever.

Mr. Mellin: That is exactly the point; that is the opinion [275] of people. He said everybody thought when they saw a doll named "Red Riding Hood" it was their doll. This author doesn't. It is for that limited purpose.

The Court: The objection will have to be sustained.

Q. (By Mr. Mellin): Speaking of yesterday, you said that before you trade-marked these names that you made a very careful investigation to determine whether they had been used before. Did that investigation include the contemporaneous literature at the time?

A. That will have to be referred to the counsel, for the simple reason we instructed him to go ahead and make the search.

Q. In other words, then,—

A. That type of literature, we don't even know who those people are. So, as I said before, anybody can write an article on anything.

Q. You didn't go through the literature at the time you adopted these names?

(Testimony of Allan L. Rowland.)

A. I did not, no, because in looking that matter up——

Q. Didn't you make a search?

A. I instructed counsel to make a search.

Q. The search you instructed him to make was a routine search made through Patent Office records?

A. That is right.

Q. That is a search made to determine as to whether the names were available? [276]

A. That is to the best of my knowledge.

Q. The availability there was the availability as far as the records of the Patent Office was concerned? Whether they were registerable or had been registered previously?

A. That is correct; that is the interest we had in them.

Q. The search you spoke of, outside of that, was not carried through the literature to determine, for example, whether dolls carrying the name of "Little Red Riding Hood" had been put out before, but merely whether you could register it?

A. Mr. Mellin, for your information, there were no small dolls on the market until Nancy Ann, except those brought into being by her, so when we are talking about a doll here we are talking about small dolls. That book refers to dolls; it never said—they didn't know about miniature dolls in the 1800's, they didn't have miniature dolls. They didn't have such miniature dolls at that time such as Nancy Ann has, to the best of our ability to look for them in the search.

(Testimony of Allan L. Rowland.)

Q. As a matter of fact, you imported these dolls from Japan originally?

A. They were miniature dolls; they were just a piece of material. I am talking about miniature Mother Goose, nursery rhymes and dolls of that character.

Q. Do you mean to tell me that you believe that your trade-marks are invalid as to large dolls but valid as to small dolls?

A. Well, we have always considered it as such. We were only [277] interested in miniature dolls.

Q. In other words, then, would you say that a doll which is not a small doll, but let us say a ten-inch doll would be open to anybody, although it is a "Red Riding Hood"?

A. There is no designation in the Patent Office as to the size of a large doll.

Q. As a matter of fact, there is no designation as to material, is there? Dolls are dolls like pigs is pigs?

A. I don't believe there is any designation as to material.

The Court: We will take an adjournment now until 2:00.

(Thereupon an adjournment was taken to 2:00 o'clock p.m.) [278]

Wednesday, August 23, 1950—2:00 P.M.

ALLAN L. ROWLAND

resumed the stand in behalf of the defendant.

Cross-Examination

(Continued)

By Mr. Mellin:

Q. And the result of your computation, Mr. Rowland? A. On the specified numbers?

Q. Yes.

A. Namely, nine dolls. It amounts to 12 per cent of our total volume.

Q. Thank you, sir.

A. But the rest of the numbers all fit in the same series, and these numbers are part and parcel of the "Nursery Rhymes" series, "Fairylane" series and "Mother Goose" series, and that amounts to 64 per cent of our volume, and the "Storybook" name, which is in question, to amount to 100 per cent of the volume.

Q. And approximately the time that you were to cancel or stop buying doll bodies, raw, unfinished doll bodies from Mr. Hinz—and by the way, those bodies were copied substantially from the Japanese dolls, weren't they, that originally came in?

A. No, sir.

Q. They were ordinary bisque doll bodies?

A. Yes.

Q. Now, at about the time that you had decided to purchase [279] further doll bodies from Mr. Hinz, did you tell Mr. Hinz at any time to put "Patent Applied For" on those doll bodies?

(Testimony of Allan L. Rowland.)

A. I believe we did, on the advice of our counsel.

Q. And did you have patent applications on those doll bodies?

A. I am pretty sure we did, or else we wouldn't have told him that.

Q. During the taking of your deposition, you said to your knowledge you had filed an application for a patent on those doll bodies, isn't that so?

A. Yes.

Q. You were asked to produce it and you did not produce it. Am I correct in assuming that when you did not produce it would indicate that there wasn't any such application?

Mr. Orr: I might state for the record that I made a search for the application, and I learned the docket had been destroyed because the application had been rejected and no appeal was taken. It was destroyed along with other old documents. Such an application was filed, I will state, by myself.

Q. (By Mr. Mellin): These doll bodies—you originally bought bisque doll bodies from Japan?

A. Yes.

Q. When that source was exhausted, the doll bodies were made by the Merritt Manufacturing Company in Oakland?

A. The source was never exhausted.

Q. The Japanese source was never [280] exhausted? A. No, sir.

Q. You still bought them during the war?

(Testimony of Allan L. Rowland.)

A. No, we didn't choose to.

Q. You started to buy them from Merritt, who made them from your own molds? A. Yes.

Q. Merritt made molds from the Japanese bodies, didn't he?

A. No, they made molds from a model Nancy Ann made up.

Mr. Mellin: No further questions, your Honor.

Redirect Examination

By Mr. Orr:

Q. You were questioned at some length this morning in regard to the similarities or dissimilarities in the boxes in which these various dolls have been packed. Is it your testimony that there is similarity in detail or that the similarity is in the general scheme of packaging?

A. The similarity is in the general over-all picture.

Q. Among your various trade-marks which are included here, which have been discussed at various lengths, which do you regard as your most important mark? A. "Storybook Dolls."

Q. Among the marks which have been charged with infringement, which is the mark that you regard as the principal infringement?

A. The "Dolls With a Story," because that is so similar: It means the same thing as "Storybook Doll."

Q. With reference to the use of names such as "Sugar and [281] Spice" and "Little Bo-Peep,"

(Testimony of Allan L. Rowland.)

is it your position that you own a property right in those names as applied to all products or merely as applied to dolls?

A. Just as applied to dolls.

Q. In general, is it your position that you are the exclusive or should be granted the exclusive rights to manufacture little dressed dolls, or do you recognize that every one is entitled to make little dressed dolls?

A. We recognize the fact that anybody can make a dressed doll; the only thing we are particularly interested in is the dolls' names that we have registered in the United States Patent Office.

Mr. Orr: No further questions.

Mr. Mellin: No questions, your Honor.

Mr. Orr: I would like to call Miss Nancy Abbott.

NANCY ANN ABBOTT

called for the defendant; sworn.

The Clerk: Would you state your name?

A. Nancy Ann Abbott.

Mr. Orr: I realize your Honor is becoming a little bored with this trial and anxious for us to conclude. I will do the best I can; but in spite of the time that it takes, I feel that the interests of these parties are very important and that I will be failing in my duty if I fail to bring out the points [282] which I think are essential to the final determination of the case.

The Court: If you are not here to annoy me, some other attorney will be here.

(Testimony of Nancy Ann Abbott.)

Mr. Orr: I hope that I am not annoying you.

The Court: It was indicated that this case would take two days; you are in the third day.

Mr. Orr: I am afraid that patent lawyers are habitually inclined to under-estimate the time.

The Court: All right.

Mr. Orr: I will have to plead guilty of being one of those.

Direct Examination

By Mr. Orr:

Q. You are the president of Nancy Ann Storybook Dolls Company? A. That's right.

Q. Incidentally, are you married? A. No.

Q. Have you ever been married?

A. Yes, once.

Q. When was that? A. In 1942.

Q. How long did that marriage last?

A. Three months.

Q. Then the comment about one of your husbands was a little bit out of line this morning, was it? [283] A. Yes.

The Court: What was that?

Mr. Orr: The answer was "Yes."

The Court: What?

Mr. Orr: The comment made this morning that the buyer for the City of Paris had been one of her husbands was a little bit out of line.

The Court: Oh.

Mr. Orr: And her answer was "Yes."

The Court: It isn't out of place or it isn't

(Testimony of Nancy Ann Abbott.)

uncommon to have a half a dozen marriages nowadays.

Mr. Orr: This is one of the exceptional cases where there was only one of very short duration.

Q. Will you, in your own words, Miss Abbott, explain to the Court how you got into the business of making little dressed dolls and how you have developed that business?

A. Well, it started originally as a hobby, and people thought that I should commercialize them, but my first trial was a sad experience; nobody wanted them. So after about six months I tried again, and they still didn't want them; they thought that anybody that offered them this size (indicating) for the same price as one of this size (indicating) was just crazy.

Mr. Orr: Let the record note that she was indicating a range of six inches in the first gesture and one of two feet or so in the second [284] gesture.

A. So bit by bit, though, they did get—I mean, they bought small orders at first, and when we went into business and incorporated in 1937. I went to New York to the Toy Fair and buyers saw them there, were not inclined to buy, but they bought a few. And then the following year they bought a little bit more and it just then began to catch on.

Q. At the time you began the enterprise, was there a supply of little dressed dolls available on the market? A. No, there was not.

The Court: What year was this?

(Testimony of Nancy Ann Abbott.)

A. 1937. Actually I started in 1935 but we incorporated in 1937. And my idea behind them—I have always been very fond of fairy tales and my idea behind them was to create a little family of dolls that children could collect, because I had always wanted something like that myself when I was a child, and it just wasn't available. So that was the actual start of the thing.

Q. (By Mr. Orr): From the start that you made then in 1937 you have built up your business which in the past 14 years has totalled something approaching ten million? A. That's right.

Q. About how many dolls did you have in your line when you first began?

A. Well, I am not sure about the first year, but around that time we had 125 in the line, and the line was a little too big; [285] it took too long to produce them with the amount of help we had, so we cut it down a little to about somewhere around 80 numbers. Just when that happened I don't know.

Q. At the very start——

A. Each year the whole line has been entirely redressed, so that there are 100 new numbers each year.

Q. In other words, the doll which is put out as "Sugar and Spice" this year is not necessarily dressed the same as the one put out last year?

A. No, it wouldn't even resemble it.

Q. Then the patterns change from year to year?

A. That is right, every year.

(Testimony of Nancy Ann Abbott.)

Q. Does that apply through the various dolls in the line? A. That is right.

Q. So that as to the "Sugar and Spice" doll which is identified by the name "Sugar and Spice" this year, it isn't the same as your "Sugar and Spice" last year? A. No.

Q. That is, it hasn't the same costume?

A. There has been maybe once before we carried a doll which was "One, Two, Button My Shoe"—everybody thought she was so cute we kept her.

Q. In other words, these various names, "Sugar and Spice," "Curly Locks," "Goldilocks" were applied to a succession of dolls? [286]

A. That is right.

Q. Which have been devised from year to year during the period you have been in business?

A. That is right.

Q. And throughout the length of your business you have used those constantly upon dolls of the general type that you have made popular?

A. Yes.

Q. In selecting the various names that you have appropriated as trade-marks for these dolls, did you make any research or study of any kind?

A. Yes, I did. As a matter of fact, I have gone a great deal into research on fairy tales and nursery rhymes. The background of most nursery rhymes are political.

Q. By that what do you mean?

A. Well, for instance, "Curly Locks," which we and many of our imitators have made a little

(Testimony of Nancy Ann Abbott.)

girl, is actually Bonny Prince Charlie. It isn't a girl.

Q. A little boy in the first place? A. Yes.

Q. Are there any other instances of that kind?

A. "Little Betty Blue" is Queen Elizabeth. There is a Betty Blue in England where she took her shoe off and couldn't find it again.

Q. Among the dolls which you have put out, are there any of [287] them named for characters of your own creation?

A. That is right. I have written quite a few nursery rhymes myself and they appear among the dolls.

Q. Did you in your research among the nursery rhymes ever find a character known as "Sugar and Spice?"

A. There is a nursery rhyme on Sugar and Spice and everything nice.

Q. Is there any individual named Sugar and Spice? A. No, it is just a little rhyme.

Q. So there has never been such a nursery character known as Sugar and Spice?

A. It is just the first words of the rhyme.

Q. Do you feel that you and your organization are entitled to the exclusive right to use nursery rhymes or the names of characters from nursery tales or from story books in general?

A. Well, I actually feel that the ones I have created and created a tremendous demand for over a period of years, that I ought to be protected somehow on them. I have made them popular.

(Testimony of Nancy Ann Abbott.)

Q. Those that you have used? A. Yes.

Q. You have no objection to others making other dolls and using other names, have you?

A. Not at all.

Q. From the time you began putting out these dolls, what [288] has been your policy with regard to the selection and the protection of the names that you have applied to them? Have you made any effort to avoid selection of names in use?

A. Well, yes; if I thought that somebody else was using the name, I mean, all he had to do was tell me so, because I wouldn't want to use the same name.

Q. Have you encountered any instance of that kind?

A. Yes, with Adam George, who was a representative of Madame Johnson, told me at the Toy Fair in 1942 that they were using "Alice in Wonderland" and they wished I wouldn't use it, so I didn't.

Q. What did you do following that?

A. We discarded that.

Q. And adopted another name in its stead?

A. Yes.

Q. What do you regard as to the proportion of names that you have selected and used on the trademarks to the number of names that are available for story-book and fairyland characters?

A. Well, I wouldn't be able to guess, but there is a book called "One Thousand Mother Goose

(Testimony of Nancy Ann Abbott.)

Rhymes." There are plenty in it that I haven't used.

Mr. Orr: No further questions.

Cross-Examination

By Mr. Mellin:

Q. Miss Abbott, I didn't mean to humiliate or embarrass you at all this morning; it was [289] just——

A. I am very glad about that, Mr. Mellin.

Q. It was just an unfortunate choice of words; I didn't do it intentionally; I was just advised that he had been your husband, and I unfortunately chose "one of your husbands."

From time to time as you have changed these doll characters, some of them approached more or less to the well-known characteristics of the dolls, didn't they, in the early days of your making of these dolls?

A. Mr. Mellin, I don't think there are any characteristics of the dolls, because there are so many versions of what they may look like that I wouldn't take an artist's viewpoint of it.

Q. For example, we will take Little Bo-Peep. She is ordinarily associated with a crook, isn't she?

A. We don't put a crook on her.

Q. I show you a doll which I have been assured is a Nancy Ann "Little Bo-Peep." Isn't that one of your creations?

A. Yes, it is. Originally we did put a crook on it, but this box here shows the doll without it.

(Testimony of Nancy Ann Abbott.)

Q. I appreciate that. It is one of your earlier dolls?
A. Yes, they have improved since.

Q. So from time to time, and particularly in the earlier days, some of the dolls had those characteristics which some of them recognized from the nursery rhymes; isn't that true?

A. You could hardly say a crook was typical of Little Bo-Peep. After all, she did tend sheep, we know that from the rhyme. [290]

Q. Yes.

A. But she don't necessarily have to have a crook. We have gone more with the little felt hat that is typical of that period than we have of the crook.

Mr. Mellin: No further questions.

Redirect Examination

By Mr. Orr:

Q. Just one further question. I believe it has been testified in the proceedings here that some of your products have been shipped abroad to England. Do you have any information as to where any of those dolls ultimately wound up?

A. Well, at the Toy Fair, this was the year before the war, Mr. Davis, buyer from Harridge's, came over and he bought about \$800 worth, but we were worried because he had to pay 52 per cent duty. So the following year when he came back I was inclined to lose hope. Anyhow, I asked him how he did with them. He said, "Oh, we not only

(Testimony of Nancy Ann Abbott.)

did very well, we have had two royal appearances, each for a collection." So he was quite happy with them. But the war came along then and he couldn't buy. Our hair comes from England.

Q. What is the situation with respect to the purchase of hair that you were discussing?

A. Hair originally comes from around Bulgaria. It is very long hair, and it gets to England as the center for cleaned hair, and they deliver it all over the world. We didn't lose any shipments. [291]

Q. Have you had any information in regard to efforts on the part of Messrs. Kerr and Hinz to secure supplies from that same source?

A. Mr. Harridge, who represents our particular factory in England, called us and said that Mr. Patterson was trying to get hold of the hair for these two people, but that he would protect us and not sell it to them.

Mr. Orr: No further questions. That is all.

I would like to recall Mr. Juster.

MAURICE JUSTER

recalled for further recross-examination.

By Mr. Orr:

Q. When you made your arrangements with Mr. Kerr and Mr. Hinz to form the corporation Dollcraft, who made the suggestion that you move the plant to Santa Clara?

A. I think it was Mr. Hinz.

Q. And who——

(Testimony of Maurice Juster.)

A. Wait a minute. He asked me if I had any objection to moving my plant and my family down the Peninsula, and I talked it over with my wife and it turned out that we both wanted to live down the Peninsula for a long time, and it would be nearer the source of supply of the dolls and better for the children, we thought, to live in the country than in the city, so we decided on the move that way.

Q. It was Mr. Hinz's suggestion then? [292]

A. Well, he didn't—

Q. His invitation, then, we will make it.

A. Wait; you asked me if it was—pardon me, what, Mr. Orr?

Mr. Orr: Will you read the question, please?

(Last question read.)

A. He didn't invite me, no. He first asked me if we had any objection to moving down to Santa Clara, and after talking it over for a few minutes, why, we had no objection whatsoever.

Q. Who determined what space was to be occupied by your organization in the plant of the Myers Ceramic Products Company?

A. He asked me how much space I needed.

Q. Who indicated the position within the plant which you were to occupy?

A. After Elise and I decided on how much space, why, he looked around the plant to find the best suitable location that would do for it and we got it.

(Testimony of Maurice Juster.)

Q. Was that your selection or Mr. Hinz?

A. It was mutual.

Q. Who determined the amount of rent that was to be paid?

A. The landlord; it was Mr. Hinz.

Q. Did you buy any new equipment when you went into the new plant? A. Yes.

Q. Where did you purchase that?

A. Most of it had to be made. [293]

Q. Who determined what equipment was to be used?

A. He asked me what equipment I needed.

Q. And then who purchased it?

A. Dollcraft Company.

Q. What individual attended to the purchase?

A. Being as I was new and Mr. Hinz was well established down there, he knew the best source to go to have it done.

Q. So Mr. Hinz did? A. Yes.

Q. Who guaranteed the payment?

A. I don't even know whether that question ever came up.

Q. Do you know who planned the plant layout, the arrangement of the machinery that you installed there? A. I did the arranging.

Q. Do you at the present time produce dolls with an unbreakable body? A. With a what?

Q. With unbreakable bodies. A. No.

Q. Do you produce dolls with movable eyes?

A. No.

(Testimony of Maurice Juster.)

Q. Have you noticed any difference in the salability of your product during the last few months because of the absence of those features?

A. We are selling more dolls in the last three months than we [294] did in the first six months.

Q. How about the six months immediately preceding this last six months, the first six months of the last year?

A. I think each year we are selling more dolls.

Q. How many employees do you have employed at the present time?

A. At the present time, seven plus contract labor.

Q. And do you have any salesmen on the road at the present time? A. Yes.

Q. How many? A. Two.

Mr. Orr: That will be all.

Further Redirect Examination

By Mr. Mellin:

Q. Just a minute, Mr. Juster. At any time did Mr. Kerr or Mr. Hinz offer or give or discuss with you the purchase of the materials for dressing these dolls? A. Never.

Q. Who decides that?

A. Elise and I decide what materials are to be bought.

Q. And you are both salaried employees of Dollcraft, that is, in the sense you both draw salary?

A. Yes.

Q. In addition to your stock ownership?

(Testimony of Maurice Juster.)

A. Yes. [295]

Q. Do Mr. Kerr and Mr. Hinz? A. No.

Mr. Mellin: That is all.

Further Recross-Examination

By Mr. Orr:

Q. You mentioned using contract labor. Will you explain briefly what you mean by contract labor?

A. We have certain articles sewed outside the plant.

Q. Piece work outside of the plant, is that it?

A. No, it isn't piece work, so much per gross. That isn't piece work. Piece work is something else. Piece work could be slave, sweat shop stuff.

Q. Gross work then? A. That is right.

Mr. Orr: That is all.

Mr. Mellin: That is all.

Mr. Orr: Mr. Kerr, please.

ROBERT E. KERR

called by the defendant under Rule 43(b); sworn.

The Clerk: Would you state your name to the Court?

A. Robert Edward Kerr.

Direct Examination

By Mr. Orr:

Q. What is your address?

A. 49 North River Street, San Jose.

(Testimony of Robert E. Kerr.)

Q. What is your occupation? [296]

A. I am a manufacturer of undressed bisque dolls.

Q. You are the party who is named as plaintiff and cross-defendant in this action?

Mr. Mellin: Just a moment; not plaintiff; cross-defendant.

Q. (By Mr. Orr): Cross-defendant?

A. Yes, sir.

Q. Were you formerly employed by the Nancy Ann Doll organization? A. Yes, sir.

Q. For how long a period were you employed there?

A. From 1939 until the beginning of 1945.

Q. Will you state briefly what your duties were during that period?

A. Well, I started out as an order checker; in other words, I filled the orders as they were sent out from the office and—that is, with the particular dolls that were called for by the order and I checked them and I packed them in cartons and shipped them. So I guess I would be technically a shipping clerk, I mean, if there is any such classification.

Q. Did you in your position or during your employment have occasion to check orders of goods as they came in, materials as they came in?

A. Yes, I also acted as receiving clerk and checked the merchandise that came in.

Q. Did you have an opportunity to observe the general course [297] of business and the manner that it was conducted?

(Testimony of Robert E. Kerr.)

A. I would say that I did.

Q. Had you prior to the time you went to work for the Nancy Ann Doll organization had any experience in the business of manufacturing and selling dolls?

A. No, sir.

Q. When did you become acquainted with Mr. Hinz?

A. I would suppose our acquaintanceship goes back to 1941, about the time that he started to make dolls for Nancy Ann Doll Company.

Q. Your acquaintance with Mr. Hinz was through the Nancy Ann organization, was it?

A. Yes, because he made dolls for them and he delivered them a lot of times himself because the idea, he was trying to help them all he could; he brought the dolls up in his own car.

Q. You became acquainted with him while you were employed by the Nancy Ann organization?

A. Yes, that's right.

Q. As a result of your employment by Nancy Ann?

A. Yes, I would say that is true.

Q. Are you acquainted with Mr. Patterson?

A. Yes.

Q. When did you become acquainted with him?

A. He also worked for the Nancy Ann Doll Company.

Q. And was your acquaintance with him as a result of your [298] employment by the same employer?

A. Yes.

Q. Was Mr. Patterson acting as selling agent

(Testimony of Robert E. Kerr.)

for Mr. Hinz before you formed the partnership Kerr & Hinz? A. Would you read that?

Mr. Orr: Read the question.

(Reporter read the question.)

A. I doubt if Mr. Hinz even knew Mr. Patterson; I am not sure about that. You would have to ask him.

Q. Mr. Patterson did act as a selling agent for Kerr & Hinz in their activities? A. Yes.

Q. When did he begin representing them in the sale of your products?

A. He started with us in 1945 when we went into business and continued with us until, I think it was the end of 1948.

Q. He began immediately upon the formation of your partnership? A. Oh, yes.

Q. Has Mr. Patterson also acted as selling agent for the Dollcraft Company?

A. Well, I have a general knowledge of that, yes, that he did.

Q. Do you know when he began representing them in a selling capacity?

A. No, I wouldn't because that was—I think he started in the [299] partnership before I knew—in fact, he was selling for us and he sold the original dolls to the Dollcraft Company, you see, because they were one of the manufacturers of dressed dolls and naturally we were selling undressed dolls and that was his business, to sell them.

Q. I am asking you, when did he begin? Or do

(Testimony of Robert E. Kerr.)

you know when he began selling dolls that were dressed by Dollcraft Company?

A. Company or corporation?

Q. Corporation.

A. Well, he was with them when they became a corporation, and he continued.

Q. He had been selling——

A. He was with them as a partnership and continued in the corporation, yes.

Q. In your discussions about forming the corporation Dollcraft Company, Inc., was there any discussion of Mr. Patterson becoming a stockholder in that organization, to your knowledge?

A. No, sir.

Q. After the Dollcraft organization got into production as a corporation, who suggested the application of various names to the dolls which had previously been issued only as "Who Am I"?

A. Our customers.

Q. Who among your own organization at your policy directing meeting? Which of you individual interested parties made the suggestion that your customers' suggestion be adopted? [300]

A. Well, Mr. Hinz.

Q. When you became interested in the doll company, you were aware of the names and trademarks which had been used by the Nancy Ann organization, were you not? A. Yes, sir.

Q. And you recognized that some of those which were being applied to the "Who Am I" Series were

(Testimony of Robert E. Kerr.)

the same marks which had been applied years before by Nancy Ann, didn't you? A. Yes.

Q. Did you offer any objection to the use of those names as infringing upon the rights of your former employer?

A. Well, the chances are—of course, this would be just a guess; the chances are I expressed the opinion that "Little Red Riding Hood" was "Little Red Riding Hood"; that is all it was and nobody could own it.

Q. How about "Sugar and Spice"?

A. I think that went all the way down the line.

Q. You applied that same theory to all of the marks? A. I think so.

Q. And also to story book—

Mr. Mellin: Just a moment. There is no showing here that we ever used the word "story book" as a matter of fact.

A. No, we never used the word "story book."

Q. (By Mr. Orr): How about "Dolls With a Story"?

A. It would be more of an indication of what kind of dolls [301] they were.

Q. Whose suggestion was it that you adopted "Dolls With a Story" as a trade-mark?

Mr. Mellin: If your Honor please, I am not sure that it is a trade-mark.

The Witness: It is not.

Mr. Mellin: He used it on the bottles or on the packages, but I am not certain it is a trade-mark or capable of being a trade-mark.

(Testimony of Robert E. Kerr.)

Q. (By Mr. Orr): As a designation, we will call it then, without being technical, or slogan, rather—as a designation or as a slogan as a mark to be applied to the containers for dolls.

A. Gosh, I don't know who suggested it; I imagine it was a combination of everybody talking it over, you see, at a policy meeting.

Q. It was a name or a mark that was selected at one of the policy meetings at which you and Mr. Hinz and Mr. Juster and perhaps others were present?

A. I think Mr. Mellin is right; it isn't a mark or name; it is more or less a slogan and description of the merchandise we make.

Q. We are not trying to determine its character; we are trying to determine how and when it was adopted?

A. When was it adopted? [302]

Q. Yes.

A. It seems to me it was in 1949; in the fall of 1949, I would say.

Q. And it was selected at a policy meeting of the directors of Dollcraft Company, is that correct?

A. To be perfectly honest with you, I don't know, but I am assuming that is how it was done. That would be the natural way for it to happen.

Q. And before it would be adopted, it would have to be approved by the directors, would it not?

A. I should think that it would be, yes.

Q. And you were one of the directors?

A. That is right.

(Testimony of Robert E. Kerr.)

Q. And do recall having approved the adoption of that mark? A. Yes.

Q. And at the time you adopted that you were aware that Nancy Ann Storybook Dolls, Inc., had been for years using the trade-mark "Storybook"?

A. Yes. I don't see any similarity.

Mr. Orr: That is all.

Cross-Examination

By Mr. Mellin:

Q. Mr. Kerr, you have been in Court while the testimony was taken here, haven't you?

A. Yes, sir.

Q. And there was some inference left by Mr. Rowland that you [303] may have used some of the addresses of supplies of doll dress material to their detriment in some fashion. Were you ever consulted with respect to what sources of supply the Dollcraft Company should buy their braids and trimmings for the dolls? A. No.

Q. Do you know anything about it?

A. Frankly, no.

Mr. Mellin: That is all.

Redirect Examination

By Mr. Orr:

Q. One other question: In your sale of finished and undressed doll bodies, do you sell them to other manufacturers who put out dressed dolls?

A. A great many of them, sir.

(Testimony of Robert E. Kerr.)

Q. Do those other manufacturers make the same line of dolls that Dollcraft Company does?

A. If they did, it would be purely accidental; I mean, I don't even know what they put out.

Mr. Orr: That is all.

The Witness: Some of them are a long way off.

Recross-Examination

By Mr. Mellin:

Q. By the way, when did you go into partnership with Mr. Hinz? A. In 1945.

Q. That was after you left the Nancy Ann Dressed Dolls?

A. Yes, sir, several months. [304]

Q. What business did you go into in partnership with Mr. Hinz?

A. Manufacturing unfinished bisque dolls.

Q. Did you make any dressed dolls at all?

A. No.

Q. The raw material, that is, the freshly made doll body, came from Myers Ceramic Company, did it? A. Yes.

Q. That is owned by Mr. Hinz?

A. That is right.

Q. And then Kerr & Hinz would get those dolls from the kilns? A. That is right.

Q. What would you do to them?

A. We processed them; in other words, we finished them; they were fired bisque, and we decorated them and finished them so that they were in a state that they could be dressed, in other words,

(Testimony of Robert E. Kerr.)

finished off with hats and dresses and shoes or anything else that they wanted to do to them.

Q. In other words, when you get through with them, they had hair, were painted——

A. Yes, decorated; their features painted on, eyes, lips, nose and cheeks and so forth.

Q. When did you get into the corporation, Dollcraft Company?

A. When it was formed in 1948.

Q. Between 1945 and 1948 you were continuously selling [305] undressed dolls? A. Yes.

Q. What proportion of those undressed dolls did you sell to Dollcraft during that period of your total production?

A. I would say a very small percentage, I mean, I would have to guess at it—five per cent.

Q. What about recently? During the last year, let us say, what percentage would you say?

A. Oh, maybe 20 or 30.

Q. 20 or 30 per cent of your total output?

A. Yes. In other words, as Mr. Juster just said, continued growing a little bit. As they do, they use more dolls.

Q. And all the other dolls that you made were sold to other people for dressing and making little dressed dolls?

A. That is right. We sell them to department stores for resale to people that want to dress them. We sell them to other doll dressers and we—for instance, we sell them to bazaars and festivals who want to dress them. We have many hundreds of

(Testimony of Robert E. Kerr.)

kinds of festivals and bazaars, that they dress them and then they have a bazaar and sell them to make money out of them.

Q. Other than these policy meetings, do you take any active part in Dollcraft Company?

A. No.

Mr. Mellin: That is all. [306]

Further Redirect Examination

By Mr. Orr:

Q. I would like to ask another question. Among these decorated doll bodies, that is, the dolls that have been painted and their features painted, I guess? A. Yes.

Q. Do you know of any of your other customers that dress those and sell them as fairyland dolls?

A. I don't know that any do and I don't know that any don't. I don't now.

Q. How about "Red Riding Hood"?

A. I don't know.

Q. "Little Miss Muffett."

A. I don't know.

Q. With respect to any of the names involved in this proceeding, do you know of any of your other customers who dress and sell the dolls produced by you and sold to them under names the same or closely similar to those involved in this proceeding?

A. I would have no way of knowing. They buy the dolls from me; what they do with them isn't my business.

(Testimony of Lester F. Hinz.)

Q. Anyway, dolls in which you are personally interested? A. I could still be outvoted.

Mr. Orr: That is all. Mr. Hinz.

LESTER F. HINZ

called under Rule 43(b) by the defendant; [307] sworn.

The Clerk: Would you state your name to the Court, please?

A. Lester F. Hinz.

Direct Examination

By Mr. Orr:

Q. What is your address, Mr. Hinz?

A. Route 1, Box 492, Los Gatos, California.

Q. And what is your occupation—your primary occupation?

A. I am a manufacturer of dolls and ceramic products.

Q. What is the name of the plant which you operate?

A. Myers Ceramic Products Company.

Q. Are you the sole owner of that?

A. Yes, sir.

Q. Are you also interested in the firm of Kerr & Hinz? A. I am a partner.

Q. And have you been a partner from the inception of that partnership? A. Yes, sir.

Q. What is the business of that partnership?

A. They process dolls. They take them in the

(Testimony of Lester F. Hinz.)

raw and they paint them and decroate them and sell them.

Q. To whom do they sell him?

A. Kerr & Hinz sell dolls to lots of people.

Q. Without reference to the particular name, but to the type of purchaser, and type of business to whom they are sold?

A. Well, Mr. Kerr listed those. They sell them to doll [308] dressers, they sell them to department stores, and they sell them to variety stores and they sell them to guilds and various organizations that dress them and resell them.

The Court: You sell them to anyone who buys?

A. That's right.

Q. (By Mr. Orr): Do you also have an interest in the Dollcraft Company that is a party to this suit?

A. Yes, sir.

Q. What is your interest there?

A. I am a stockholder and president of the corporation.

The Court: What?

A. Stockholder and president of the corporation.

Q. What corporation?

A. The Dollcraft Corporation.

Q. (By Mr. Orr): How long have you been connected with the doll business?

A. Since 1941.

Q. When and how did you first become interested in the doll business?

A. You want the whole story?

Q. Just briefly.

(Testimony of Lester F. Hinz.)

The Court: Yes, tell us the whole story.

A. I—a gentleman that I had never saw before entered my plant with a little doll and asked me if I could make those bodies, and I said yes, I could. He told me his name was Fred [309] Anderson and that he was a partner in the Nancy Ann Doll Company and they needed these doll bodies very badly. And if I recall, at that time I told him that I wasn't interested in making the dolls. And he came back again and asked me if I wouldn't visit the plant of the Nancy Ann Doll Company, which I did, and at that time I met Mr. Rowland, who showed me around the plant, showed me what he was doing in the way of dressing dolls, and he also asked me if I could make bisque dolls, and I told him I could, and there followed a discussion then of how many dolls he would need. Then he again asked me—he was very anxious at that time to know whether or not I could make dolls, and I started shortly after that to make the dolls.

Q. (By Mr. Orr): And that was your first experience in the doll business? A. Yes, sir.

Q. And your arrangement with the Nancy Ann organization continued for how long?

A. Well, that is a little vague in my memory; it must have been some time in 19—I don't remember the date exactly.

Q. As near as you can remember?

A. I have a note here some place. It was in '44—the end of '44, I believe—somewhere towards

(Testimony of Lester F. Hinz.)

the end of 1944. It was a drawn-out affair; it wasn't at any particular date; that is why I don't remember.

Q. At the time you began manufacturing doll bodies for the [310] Nancy Ann organization, were you supplied with a pattern or mold from which to pattern your work?

A. Yes, I was given a mold; that's right.

Q. Were you also given any instructions as to what kind of materials were to be used?

A. None whatsoever.

Q. Were suggestions made as to what was preferred by the Nancy Ann organization?

A. I don't know what you mean by suggestions. Do you mean so far as the technicalities?

Q. If you are distinguishing between being requested or it merely being suggested to you, I would like to know. Were different kind of materials discussed with Mr. Rowland or anyone connected with the Nancy Ann organization?

A. What kind of materials do you mean, Mr. Orr?

Q. For making the bodies. A. No.

Q. Was any particular kind of materials specified in your contract?

A. I had no contract in the first place, and there were no materials specified, sir. In fact, I used the same materials to make dolls that I used to make soap dishes and towel racks and other things I make in the plant.

(Testimony of Lester F. Hinz.)

Q. Following the termination of your contract with the Nancy Ann organization, did you continue to make and sell doll [311] bodies to others?

A. Yes.

Q. Ultimately you became interested in the Dollcraft Company which carries on the dressing of those bodies, is that right? A. Yes.

Q. Do you know Mr. Patterson?

A. Yes, I know Mr. Patterson.

Q. When did you become acquainted with him?

A. I can't answer that directly. I knew of Mr. Patterson while he was a salesman for the Nancy Ann corporation; I don't remember ever formally meeting the gentleman at that time.

Q. You were aware that he had acted as salesman for Nancy Ann?

A. Yes, vaguely I do. I think I did know that he was a salesman; it was of no importance to me at that time.

Q. Thereafter he became a salesman for you in selling doll bodies?

A. Yes, Kerr & Hinz, that is.

Q. Did he sell doll bodies for you before the first or the partnership of Kerr & Hinz was formed?

A. Did he sell doll bodies for me?

Q. Yes. A. No, sir.

Q. Not before you formed the partnership with Mr. Kerr?

A. No, he didn't sell doll bodies for me before we formed the partnership. [312]

Q. How long after the termination of your

(Testimony of **Lester F. Hinz.**)

working arrangement with Mr. Rowland was it that you formed the partnership with Mr. Kerr?

A. Well, my working arrangement with Mr. Rowland or the Nancy Ann Doll Company terminated in 1944, and it was some time in 1945 that I recollect that Mr. Patterson sold dolls for Kerr & Hinz.

Q. When was the Kerr & Hinz partnership formed? Was that in 1945?

A. Yes, I believe the early part—spring of 1945.

Q. Did Mr. Patterson begin selling for the Kerr & Hinz organization immediately upon its formation?

A. I do not believe that we had anything to sell immediately. It takes some time to get some dolls made.

Q. In the interval between the time you ceased making dolls for Nancy Ann and the time you began supplying doll bodies to Kerr & Hinz, did you sell any doll bodies to other purchasers?

A. I don't really remember; I don't think so, sir.

Q. When you formed the corporation Dollcraft—I understand that you were introduced to Mr. Juster by Mr. Patterson; is that correct?

A. Yes.

Q. Was there any proposal that Mr. Patterson become a stockholder or party to the corporation?

A. I don't ever recall a proposal of that [313] kind.

Q. Was there any discussion of any kind?

A. No, I don't remember any such discussion.

(Testimony of Lester F. Hinz.)

Q. When the corporation was formed, who suggested that the activity be transferred from San Francisco to your plant at Santa Clara?

A. I believe that was a consensus of opinion. It would be a much easier way to operate, and it would save freight on the dolls.

Q. Was it you that selected the location in the plant that they were to occupy?

A. Not exactly; in fact, it was decided mutually, because there were certain things they needed, such as light, and I just couldn't put them anywhere. There were girls that worked there and they had to have proper quarters.

Q. You, of course, as landlord determined the amount of rent to be paid; is that right?

A. Yes, I determined the amount of rent.

Q. And Dollcraft does pay rent to you for the quarters they occupy?

A. Yes, sir.

Q. The firm of Kerr & Hinz also occupies quarters in the Myers Ceramic Products Company plant, doesn't it?

A. Yes.

Q. Does the partnership also pay rent to you for their quarters? [314]

A. Yes, they do.

Q. You also make the doll bodies entirely as an activity of your Myers Ceramic Products Company, do you not?

A. Now?

Q. Yes.

A. No.

Q. You do not make the bodies themselves?

A. No.

Q. Where do you have those made?

(Testimony of Lester F. Hinz.)

A. They are made by another company. Kerr & Hinz now buys their doll bodies from others.

Q. They do not use doll bodies made by your organization?

A. I have discontinued making doll bodies, sir.

Q. When did you discontinue making the bisque bodies? A. Last Christmas some time.

Q. Up to last Christmas did Kerr & Hinz purchase their supplies of doll bodies from you?

A. Yes, sir.

Q. That was an activity of your own organization? A. Yes, sir.

Q. Whatever profit was gained from the manufacture of those bodies was yours; is that correct?

A. If there was profit, yes.

Q. As I understand it, those doll bodies were processed by the Kerr & Hinz organization? [315]

A. Yes.

Q. That is, decorated, wigged, put in condition to be dressed? A. That is right.

Q. And then they were sold to manufacturers or others who had use for them, but primarily to manufacturers to dress, to make dressed dolls?

A. Well, not only to manufacturers.

Q. To organizations who applied garments to them to make them dressed dolls?

A. Yes, that is a natural——

Q. And Dollcraft is one of the customers of Kerr & Hinz? A. Yes.

Q. On all dolls that the organization Kerr &

(Testimony of Lester F. Hinz.)

Hinz sold to Dollcraft, you would participate in the profits, if any, as a partner of Kerr & Hinz?

A. Yes, sir.

Q. Then when those dolls were dressed and sold, you as a stockholder of Dollcraft Company would share in the profit, if any, made from the sale of those dolls?

A. Yes, sir.

Q. So you personally profit directly from the manufacture of the bodies, from their decoration and from the sale of the dressed dolls as the final product; is that right?

A. If there is a profit, yes, I do.

Q. I understand that Kerr & Hinz sell the doll bodies [316] to others than Dollcraft for purposes of decorating dolls. Do you know whether any of those other companies put out a doll bearing a name such as "Little Bo-Peep"?

A. I have no—I don't know.

Q. What would you estimate the net worth of Dollcraft Company to be at the present time?

A. Well, I would estimate somewhere between twenty and thirty thousand dollars. That is merely a guess.

Q. And at what figure would you estimate the net worth of the organization Kerr & Hinz?

A. Placing of values is a hard thing to do; I would say between fifty and a hundred thousand dollars.

Q. About where would you place the net worth of Myers Ceramic Products Company?

A. I don't really know. That is, values are hard

(Testimony of Lester F. Hinz.)

to say. Would you say what I would ask for the plant if I were to sell it, or what it is worth in real estate and properties? What do you mean?

Q. Net worth such as might appear in a financial statement.

A. In my own financial statement?

Q. Yes.

A. \$200,000 or \$300,000, sir.

Q. As a member of the directors of Dollcraft Company you attend their policy-forming meetings, don't you?

A. Occasionally. Not as many as I ought, [317] sir.

Q. Were you present at the time it was determined that individual names should be applied to the dolls previously put out as "Who Am I" dolls?

A. Yes, I believe I was.

Q. And whose suggestion was it that those names be applied?

A. I don't believe it was any single person's suggestion; it was a result of the discussion of the idea.

Q. And it was mutually agreed that it should be done? A. I think it was, yes.

Q. At the time you determined to apply those names to the "Who Am I?" Series dolls, were you aware that a number of them had been used for some time by the Nancy Ann organization?

A. Yes, I was.

Q. And were you aware that they had been registered?

(Testimony of Lester F. Hinz.)

A. Yes, I was aware that they had been registered.

Q. And you nevertheless endorsed the placing of those marks on your dolls with the knowledge that it would be an invasion of the rights of the Nancy Ann organization?

Mr. Mellin: Just a minute, your Honor. I think that calls for a legal conclusion as to what is an invasion of the rights. The fact is that they decided and did it. Whether it is an invasion of the rights is a question for this Court.

The Court: Sustained.

Q. (By Mr. Orr): You stated you were not now making bisque doll bodies for the Dollcraft organization. What sort of bodies [318] are being used in the Dollcraft dolls at the present time?

A. In the Dollcraft dolls?

Q. Yes. A. Bisque bodies, sir.

Q. What kind are being sold by Kerr & Hinz?

A. Some kind of bisque dolls.

The Court: What is a bisque body?

A. Bisque, that is unglazed ceramic, burnt clay.

Q. Do you produce that yourself?

A. Yes.

Q. Or buy it?

A. I produced it up until last Christmas, and now we are buying it.

Q. (By Mr. Orr): Who are supplying the bodies now?

A. It is a company known as the Merritt Doll Company.

(Testimony of Lester F. Hinz.)

Q. Where is it located?

A. I think it is El Cerrito.

Q. Do you have a financial interest in that company?

A. No, sir.

Q. Do you have any connection with it at all?

A. No.

Q. Does Mr. Kerr have any interest in that company?

A. No, there is no connection between any of the companies with the Merritt people.

Q. There is no connection between any of your companies and [319] the Merritt Doll people?

A. That's right; absolutely none.

Q. How many employees does the Dollcraft Company have at the present time?

A. I really don't know.

Q. Have you any idea how many they had this time last year?

A. No, sir, I don't.

Q. Who in your organization would be best able to supply that information?

A. Mr. Juster. He is the manager of the Dollcraft Company.

The Court: Approximately, if you know?

A. Oh, I would guess there is five or six people there working for the Dollcraft Company.

Mr. Orr: No further questions.

Cross-Examination

By Mr. Mellin:

Q. Mr. Hinz, you are an artisan so far as ceramic materials are concerned, are you not?

(Testimony of Lester F. Hinz.)

A. Yes.

Q. You were formerly a tile-setter?

A. Yes, sir, that is all I ever did; I was a tile-setter.

Q. And you became a manufacturer and you built your Myers Ceramic plant up from nothing to what it is? A. Yes, sir.

Q. And you actually worked hard to do that?

A. I have worked hard, yes. [320]

Q. Is there any difference between making ceramic or bisque doll bodies than there is other ceramic products?

A. With the possible exception of the shape of the mold.

Q. Otherwise the method is the same?

A. The method is exactly the same.

Q. And the clays you use are different or are the same?

A. The clays that I used to make dolls were exactly the same as the clay that I used to make the various ceramic articles that we made in the plant before we made the dolls.

Q. Is there some particular reason for you stopping making doll bodies—manufacturing doll bodies?

A. That always has been a very small part of the business of Myers Ceramic Products and it usually was more of a nuisance than it was a profit, because, as I say, tile is my business and the dolls usually took up space in the kilns and around the plant that the tiles used to take, so I decided at

(Testimony of Lester F. Hinz.)

Christmas time, this last Christmas, to discontinue the manufacture of bisque doll bodies.

Q. So that you could make more tile?

A. Yes, sir.

Q. What was disclosed by Mr. Rowland or by Mr. Anderson at the time that you were asked to make doll bodies for Nancy Ann?

A. What did they give me as the information, you mean, sir?

Q. Yes. [321]

A. They gave me no information so far as the manufacture of doll bodies.

Q. They supplied you a sample doll?

A. I believe they supplied a mold that had been made by others; that is all I remember.

Q. Did you do anything to the mold?

A. I made a doll from the mold and remodeled it.

Q. Did you subsequently make other molds?

A. Yes.

Q. Did you have a substantial investment in special equipment for making dolls?

A. Yes, because of the volume of dolls that the Nancy Ann Company required, it was necessary for me to invest in equipment and molds to carry on that business and deliver the dolls to the Nancy Ann Company.

Q. Did they share in any of that investment? I mean, directly?

A. Neither directly or indirectly did the Nancy

(Testimony of Lester F. Hinz.)

Ann Company ever have anything in the Myers Ceramic Products Company.

Q. Do you take any active part in the management of Dollcraft Company?

A. I don't have time, sir; I take no active part in the management.

Q. What about Kerr & Hinz? Do you take any active part in that?

A. A little, but Mr. Kerr is a very capable man and operates [322] that part of it.

Q. Your time is spent primarily in Myers Ceramic, is it? A. Yes, sir.

Q. Did Mr. Rowland ever supply you with any formula for making dolls?

A. No, he did not, sir.

Q. Did you answer the question: Is there any difference in making dolls than any other ceramic product, as far as your plant is concerned?

A. There is no difference, yes.

Mr. Mellin: That is all.

Redirect Examination

By Mr. Orr:

Q. Molds are commonly used in your plants for molding various kinds of articles, are they not?

A. Yes, sir.

Q. And is the cost of the mold ordinarily figured into the article that you propose to sell that is made from that mold?

A. The custom is to distribute the cost of molds over a period of time, yes, sir.

(Testimony of Lester F. Hinz.)

Q. And is that the case in the Nancy Ann Doll situation? A. Yes, sir.

Q. And was the price of those molds amortized over the period that you were making dolls?

A. I never was quite sure of that.

Q. You were paid for the dolls that you made and delivered [323] to Nancy Ann?

A. Yes, sir.

Mr. Orr: That is all.

Mr. Mellin: No further questions.

The Court: You are an ex-tile-setter?

A. I started as a tile-setter myself.

Q. Where? A. In San Francisco.

Q. How long did you remain at that?

A. I started as a tile-setter in 1926 and I set tile until 1936. I was a tile-setter until that time, and for a short while I was a contractor; I hired men and worked with them.

Q. When did you move down the Peninsula?

A. The man after whom the plant is named, Mr. Myers, was a friend of mine, and he was a tile manufacturer, and he asked me if he took over a tile plant or ceramic plant would I set the tile that he made, and we agreed to that and formed this partnership. And then he suddenly died and I had to then discontinue tile-setting and go down to the plant and take over there.

Q. Where is the plant located?

A. Just outside of Santa Clara.

Q. Where do you get the material that you make the tile from?

(Testimony of Lester F. Hinz.)

A. Most of the clays—that is the clay that forms the body of the tile—comes from the Death Valley, your Honor, in [324] Southern California. We use a lot of talc.

Q. What? A. Talc.

Q. What is talc?

A. The same material talcum powder is made out of. We grind it and form dolls from it.

Q. It is porous?

A. Yes. We make what is called bisque presses. We press the damp clay, then make a figure, then we fire it and put a glaze on it.

Q. What do you produce now?

A. You mean what type of materials?

Q. Yes.

A. We make a floor line—a wall and floor line, that is, for bathrooms and kitchens; we make a line of accessories such as towel bars and soap dishes and paper holders. They are made by the cast process; that is, we cast those in the same method that we cast dolls. They are not pressed. The tile is pressed, but these accessories that we make, they are cast.

Q. Forms?

A. That's right; we pour them into the plaster mold, pour the excess out, let it sit, take the mold away, let it dry and then we glaze it.

Q. What is the glazing process? Is it fired?

A. Yes, the basis of that is usually ground glass to which we [325] add metal oxides that in the heat give the glaze and color, but in the heat the glaze

(Testimony of Lester F. Hinz.)

comes to a melt—we don't let them run—it just comes to a melt and we hold it there, so that when the tile comes out it has a smooth, glazed surface. These oxides that we add in the ground-glass compounds is what gives it the various colors.

Q. How many men do you employ?

A. I have now about 33 men, including three women.

One of the girls sorts tile. One is a very good kiln setter. She simply bosses on a small kiln we have. And I have a girl in the office.

Q. What do you fire the kilns with?

A. Natural gas. We have obtained a standby in the real cold weather.

Q. Do you get enough heat from gas?

A. Not exactly. You must mix air or oxygen with gas in order to get the high temperature we require; gas itself alone will not give you high heat.

Q. You run that business yourself?

A. Yes, sir. I am the sales manager, the president and technician, and the whole business.

The Court: I am glad to see a tile-setter useful. All right. Step down.

Mr. Orr: The question Mr. Hinz couldn't answer I would like to ask of Mr. Juster. [326]

Mr. Mellin: What is that?

Mr. Orr: The number of employees this time last year.

MAURICE JUSTER

recalled for further cross-examination.

By Mr. Orr:

Q. You stated a little while ago that you had seven employees at the present time? A. Yes.

Q. How many did you have this time last year?

A. Approximately the same number.

Q. And how does the amount of outside contract work compare? A. About the same.

Mr. Orr: That is all.

Mr. Mellin: No questions.

The Court: You may step down.

Mr. Orr: At this time I would like to offer in evidence the depositions of Mr. Juster, Mr. Robert E. Kerr and Mr. Lester E. Hinz, taken Friday, January 20, 1950, together with the paper exhibits that were attached thereto.

The Court: Let them be admitted and marked. No objection.

(Depositions of Mr. Juster, Mr. Kerr and Mr. Hinz referred to were thereupon marked Defendant's Exhibit P in evidence.)

Mr. Orr: That will conclude the case for the defendant and cross-complainant.

Mr. Mellin: We offer no rebuttal, your [327] Honor.

We are ready to submit the case.

The Court: Is the matter submitted on both sides?

Mr. Mellin: Yes, your Honor, as far as I am concerned.

Mr. Orr: I would like to have an opportunity to argue it, either orally or by brief.

The Court: How much time do you wish?

Mr. Mellin: What about submitting it on briefs?

Mr. Orr: That is what I suggested. A week or ten days.

The Court: For argument?

Mr. Orr: No, for presenting a brief. For argument I would like about an hour and a half, I think, or two hours to be orally argued.

Mr. Mellin: I am wondering if we couldn't save time if we just submitted it to the Court on briefs on the legal questions. We would take very little time. We would be willing to take five days for the plaintiff and ten days for the defendant.

The Court: What is the question for decision, gentlemen?

Mr. Mellin: The question, your Honor, is whether or not these marks are valid trade-marks, whether or not the defendant has infringed, and whether or not there has been unfair competition.

The Court: Whether or not they are valid trade-marks?

Mr. Mellin: Yes, your Honor. There are in this proceeding a group of about eleven marks. They are set out in the pleadings. [328]

Mr. Orr: They are set out in the pleadings, but there are a number of marks and they will require a separate discussion and a separate evaluation. The factors affecting one group of marks will not

affect others. So that there are several marks and several types of marks that will require separate consideration in connection with your determination whether or not the mark is valid and whether or not it has been infringed, and in addition to the question of infringement, and regardless of the validity, whether or not there has been unfair competition.

The Court: There is no question about the evidence.

Mr. Mellin: No, your Honor.

Mr. Orr: As I say, I have never seen a case where there has been so little dispute about the facts.

The Court: That is helpful. It doesn't resolve itself into a question of fact, then.

Mr. Mellin: That is exactly our position.

The Court: I think both of you gentlemen are familiar with your positions——

Mr. Mellin: Yes, your Honor.

Mr. Orr: Very much so.

The Court: ——now as well as you will be at any time.

Mr. Mellin: Yes, your Honor. That is so.

The Court: I think while we all have it fresh in our minds we will go on now, or I will give you until tomorrow [329] morning to prepare.

Mr. Orr: I would like to come out tomorrow morning.

The Court: That will give you some time to prepare.

Mr. Mellin: 10:00 o'clock, sir?

The Court: 10:00 o'clock tomorrow morning.

Mr. Orr: Very well.

Mr. Mellin: Would the Court set thirty minutes to a side?

The Court: No, I will not fix a time.

Mr. Mellin: I thought you said an hour.

The Court: You can fix the time now if you want, on both sides, whatever time you wish.

Mr. Mellin: As far as we are concerned, in deference to counsel, 30 or 45 minutes per side.

Mr. Orr: I think I would want an hour.

The Court: Then you will have an hour each tomorrow morning.

Mr. Mellin: Yes, your Honor.

The Court: We will put it over until tomorrow morning at 10:00 o'clock, August 24.

(Thereupon an adjournment was taken to tomorrow, Thursday, August 24, 1951, at 10:00 o'clock a.m.)

Certificate of Reporter

I, Official Reporter, and Official Reporter pro tem, certify that the foregoing transcript of 330 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ W. A. FOSTER.

[Endorsed]: Filed May 26, 1951. [330]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or true copies of minute orders entered in this Court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the attorneys for the Appellant:

Complaint.

Motion for preliminary injunction.

Temporary restraining order.

Notice of motion and motion for an order vacating temporary restraining order.

Verification of complaint.

Affidavit of Oscar A. Mellin, filed November 9, 1949.

Affidavit of Lester F. Hinz, filed November 9, 1949.

Order denying motion to vacate temporary restraining order.

Affidavit of Lester F. Hinz, filed November 16, 1949.

Notice of motion and motion for leave to join additional parties plaintiff and for issuance of summons, etc.

Affidavit of A. L. Rowland, filed November 18, 1949.

Affidavit of Lester F. Hinz, filed November 21, 1949.

Affidavit of Elise Juster, filed November 21, 1949.

Affidavit of Robert E. Kerr, filed November 21, 1949.

Order denying motion for preliminary injunction without prejudice and reserving ruling on motion to join parties plaintiff.

Defendant's answer and counterclaim.

Order for issuance of summons.

Motion to vacate order for issuance of summons or to dismiss counterclaim.

Affidavit of Lester F. Hinz, filed February 4, 1950.

Order denying motion to vacate order for issuance of summons, etc., without prejudice.

Answer to counterclaim.

Opinion.

Findings of fact and conclusions of law.

Judgment.

Motions by defendant for a new trial, to amend findings and to amend judgment.

Order denying motion for new trial; allowing amendment to Finding 11, and denying motion for other amendments of findings and judgment.

Notice of appeal.

Bond for costs on appeal.

Order extending time to file record on appeal to April 29, 1951.

Order extending time to file record on appeal to May 27, 1951.

Designation of record on appeal.

Deposition of Allan L. Rowland.

Depositions of Maurice Juster, Robert E. Kerr
and Lester F. Hinz.

Reporter's Transcript for August 21, 22, 23, 1950.

Plaintiffs' Exhibits 1 to 60, inclusive.

Defendant's Exhibits A to O, inclusive.

In Witness Whereof, I have hereunto set my hand
and affixed the seal of said District Court this 26th
day of May, 1951.

[Seal] C. W. CALBREATH,
 Clerk.

By /s/ C. M. TAYLOR,
 Deputy Clerk.

[Endorsed]: No. 12953. United States Court of
Appeals for the Ninth Circuit. Nancy Ann Story-
book Dolls, Inc., a Corporation, Appellant, vs. Doll-
craft Company, a Corporation; Lester F. Hinz and
Robert E. Kerr, Appellees. Transcript of Record.
Appeal from the United States District Court for
the Northern District of California, Southern Divi-
sion.

Filed May 26, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 12953

DOLLCRAFT CO., a Corporation; LESTER F.
HINZ, ROBERT E. KERR,

Plaintiffs-Counter-Defendants,

vs.

NANCY ANN STORYBOOK DOLLS, INC., a
Corporation,
Defendant-Counter-Claimant.

CONCISE STATEMENT OF DEFENDANT-
APPELLANT'S POINTS ON APPEAL
PURSUANT TO F.R.C.P. 75 (d)

Now comes the defendant-appellant, Nancy Ann Storybook Dolls, Inc., and having heretofore designated that the record on appeal shall contain the complete record and all the proceedings and evidence in the action (but not including the briefs and memoranda of points and authorities heretofore filed in behalf of the parties in the course of the proceeding), now makes the following statement of points on which it intends to rely for appeal to the United States Court of Appeals for the Ninth Circuit from the order and judgment of the above-entitled court in the above-designated action:

1. The United States District Court erred in holding invalid and in ordering the cancellation of appellant's registration of the trade-marks:

No. 389115—"Storybook"

No. 395451—"Goldilocks"

No. 395454—"Little Bo-Peep"

No. 403261—"June Girl"

No. 404576—"Mistress Mary"

No. 404581—"Curly Locks"

No. 404586—"Little Miss Donnett"

No. 420077—"Red Riding Hood"

No. 432208—"Little Miss Muffett"

No. 525896—"Story"

2. The United States District Court erred in holding that appellant's trade-marks listed under numbered Paragraph 1 above were not validly registered by the United States Patent Office.

3. The United States District Court erred in failing to hold that the trade-marks designated under numbered Paragraph 1 above were validly registered by the United States Patent Office.

4. The United States District Court erred in failing to hold that the trade-marks designated under numbered Paragraph 1 above have been infringed by appellees and each of them.

5. The United States District Court erred in failing to rule that the individual defendants Lester E. Hinz and Robert E. Kerr are jointly and severally liable for infringement of appellant's trade-mark rights in the registered trade-marks involved in the above-designated action.

6. The United States District Court erred in failing to award to appellant-counter-complainant

damages, costs, expenses and attorney fees in the above-entitled action.

7. The United States District Court erred in awarding to appellee its costs and expenses in the above-entitled action.

8. The United States District Court erred in failing to rule that each and all of appellant's trade-marks involved in the above-entitled action are valid, and that the same have been infringed by defendants; and in failing to award to appellant: damages for past infringement; an injunction restraining future infringement of those marks held invalid; and its costs, expenses and attorney fees in the proceedings.

Dated at San Francisco, California, this 6th day of August, 1951.

/s/ HUGH N. ORR,

/s/ WM. G. McKAY

Attorneys for Appellant.

Receipt of copy acknowledged.